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82-374

No.

IN THE

Supreme Court of the United States

October Term, 1982

ROBERT FLANAGAN,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

JAMES KEWESHAN,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

JOSEPH LANDIS,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

THOMAS McNAMEE,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the panel opinion denying Petitioners the counsel of their choice to present their common defense due to potential conflicts of interest, despite a valid waiver of such conflicts, is inconsistent with the decisions of this Court?

2. Whether the panel opinion denying Petitioners the counsel of their choice to present their common defense due to potential conflicts, is contrary to the decisions of every other circuit which has addressed this issue?

3. Whether Fed. R. Crim. P. 44(c) permits a court to undercut Petitioners' constitutionally protected choice of retained counsel?

4. Whether the panel opinion below precludes the presentation of a common defense, regardless of the number or affiliation of counsel?

5. Whether the panel opinion below undermines the ability of clients to consult with and retain counsel of their choice?

6. Whether resolution of the issues posed will substantially diminish the workload of all federal courts?

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners above named respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this case on June 2, 1982, petition for rehearing denied, July 12, 1982.

OPINIONS BELOW

The Opinion of the panel of the United States Court of Appeals for the Third Circuit, affirming the Opinion of the United States District Court for the Eastern District of Pennsylvania, is reported at 679 F. 2d 1072 (3d Cir. 1982). A copy of this Opinion is printed in the Appendix at A2.

The Judgment of the Third Circuit Court of Appeals, dated June 2, 1982, affirming the Judgment of the District Court entered December 4, 1981, is printed in the Appendix at A32.

The Orders of the Third Circuit Court of Appeals denying Petitions for a Rehearing and recalling its mandate erroneously issued are printed in the Appendix at A34, A1.

The Opinion of the United States District Court for the Eastern District of Pennsylvania, affirmed by the panel of the Third Circuit, is reported at 527 F. Supp. 902 (E. D. Pa. 1981). A copy of this Opinion is printed in the Appendix at A12.

The District Court's Order of December 2, 1981, granting the government's Motion to Prohibit Multiple Representation of Petitioners is unreported. A copy of this Order is printed in the Appendix at A29.

The District Court's Order of December 4, 1981, granting Petitioners' Motion for Reconsideration and/or Clarification, is not reported. A copy of this Order is printed in the Appendix at A30.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, printed in the Appendix at A32, was entered on June 2, 1982. On July 12, 1982, the Court denied a Petition for Rehearing filed by each of Petitioners herein, A34. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF PROCEDURE INVOLVED

United States Constitution:

Amendment V:

> No person shall . . . be deprived of life, liberty, or property without due process of law; . . .

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Federal Rule of Criminal Procedure 44(c):

> Whenever two or more defendants have been jointly charged . . . or have been joined for trial . . . , and are represented by the same retained . . . counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation, Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

STATEMENT OF THE CASE

Petitioners were members of the Philadelphia Police Department's "grandpop" squad, a decoy team comprised of volunteers assigned to the stake-out unit, which is designed to deal with street crime. The team decoy, posing as one aged and infirm, is expected to attract muggers and robbers who would otherwise feast upon those truly helpless. Petitioner Flanagan generally assumed the decoy role, with Petitioners McNamee, Keweshan and Landis providing protection and making arrests.

During the spring of 1981, Petitioners knew[1] that: (1) the Philadelphia District Attorney had begun an investigation into arrests made by the team to determine whether criminal charges should be lodged against them; (2) a federal grand jury had begun an investigation of the same arrests to determine whether federal charges should be lodged; and (3) the Internal Affairs Unit of the Philadelphia Police Department had begun its own investigation into the same arrests.[2] Moreover, while all three investigations were proceeding, Petitioners were called to Court, on numerous occasions, to testify at preliminary hearings and trials of defendants they had arrested, which arrests were the subject of these inquiries.

Each Petitioner independently determined that he needed counsel to assist him in dealing with the complex and confusing situation then unfolding. Each Petitioner decided that his own interests were best served by presenting a common front in the face of the investigations. On May 6, 1981, each Petitioner retained the firm of Sprague & Rubenstone to provide representation in each of these matters given each Petitioner's belief in the skill and expertise of the law firm's members. The law firm, after meeting with Petitioners jointly and separately, agreed that the best interests of each Petitioner were served through the presentation of a common defense and that no conflict of interest existed.

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1. On Sunday, February 1, 1981, the Philadelphia Inquirer ran a front page article purporting to investigate the propriety of certain arrests made by Petitioners' decoy team. As a result of this and a spate of other articles, Petitioners were reassigned by the Commissioner of Police to other police duties.

2. The District Attorney ultimately lodged no criminal charges against Petitioners. He dismissed five cases lodged against state court defendants arising from decoy team arrests only because each defendant passed a lie detector test. The District Attorney has and continues to press forward with prosecutions based solely upon arrests and testimony of Petitioners. Internal Affairs found no evidence of wrongdoing.

Sprague & Rubenstone thereupon began to expend hundreds of hours in connection with the representation of Petitioners, conducting investigations of the decoy team's arrests, interviewing witnesses, reviewing police records, appearing at state court proceedings, preparing briefs and motions, and advising its clients as to innumerable matters which arose during the course of the representation. Over the next few months, as the Petitioners and counsel continued to work together, Petitioners developed a greater feeling of confidence and trust in the firm of Sprague & Rubenstone and its lawyers, complementing the initial respect for the firm's abilities which had caused each Petitioner to initially decide to retain the firm as counsel.[3]

On September 10, 1981, four months after the firm was retained, Petitioners were charged with criminal violations of the federal civil rights statutes in a thirteen count indictment returned by a grand jury sitting in the Eastern District of Pennsylvania. The return of an indict-

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3. "THE COURT: Just tell me in your own words, because I want to understand why you are giving up this very important right.

MR. FLANAGAN: Sir, I can only explain it as a layman rather than as an attorney.

THE COURT: Yes. Just give it to me in your own words.

MR. FLANAGAN: All right, sir. I will explain it this way: Early-on when this situation first developed, and discussing the matter with my colleagues, we determined that we wanted the firm of Sprague & Rubenstone; Mr. Thall and Mr. Leonard are attorneys of the firm.

We spent quite a bit of time, personal time, attending to the matters relating to this particular situation, discussing particular, specific details regarding the allegations that these attorneys who are present here today are now presently aware of.

I can't speak in behalf of my colleagues, but personally I got—I have developed a large amount of confidence, I feel extremely comfortable with the way the matter has been handled up to the present time." (A68).

ment did not alter Petitioners' predetermined decision to proceed upon a common defense even were separate counsel ordered (A43-A44). Indeed, from the first date Petitioners appeared in the office of their counsel, each had been advised of potential conflicts of interest and the option of proceeding with separate counsel (A42-A45). From the inception of the attorney-client relationship, each Petitioner decided that, despite knowledge of available options and the possibility of judicial intervention in the retention of counsel of his choice, he wished to proceed with a common defense to be presented by the firm of Sprague & Rubenstone (A52, A55, A65-A66).

In response to the Respondent's Motion for a Hearing and to Prohibit Multiple Representation, only seeking to prevent Sprague & Rubenstone from representing more than one Petitioner, the district court held a hearing on November 12, 1981, pursuant to Fed. R. Crim. P. 44(c). At that hearing, each Petitioner repeatedly and unequivocally stated his desire to have a unified defense presented by Sprague & Rubenstone, his awareness of potential conflicts which could arise, and his willingness to waive such conflicts.

Following the lengthy Rule 44(c) hearing, at which each Petitioner was interrogated by the court and counsel for Respondent, the court found the following facts:

> "[I]t is quite apparent that there is no actual conflict today . . . It appears to me quite apparent that a conflict of interest is likely to arise in the course of these proceedings.
>
> "It is equally apparent that each of these defendants is fully and completely aware of the potential for conflict of interest, and that each, without financial pressure, has made the decision to waive any claim of conflict of interest, and is doing so intelligently and voluntarily, and to be represented by one counsel." (A45, A74).

Based upon these facts, the court below asked that certain issues be further briefed:

> "I am not satisfied at this moment that in light of my perception that the conflict of interest is very likely to arise in this case, that I can nevertheless accept the waiver of these defendants."
>
> • • •
>
> "If I do decide that separate counsel are required, does this require that present counsel be eliminated from the case altogether?" (A74, A76).

Briefs were simultaneously submitted by Petitioners and Respondent on November 19, 1981.

On December 2, 1981, the trial court entered an Order precluding Petitioners from retaining counsel of their choice by disqualifying the firm of Sprague & Rubenstone from representing any petitioner herein, A29. On December 3, 1981, Petitioners filed a Motion for Reconsideration and/or Clarification to assure that the basis for the court's Order was clear. On December 4, 1981, the court granted the Motion, clearly setting forth as the basis for its disqualification—"the presumption that privileged information has been acquired as a result of the attorney-client relationship." A30.

The court stayed its Order so that the correctness of its holding might be determined by the Third Circuit prior to conducting pretrial proceedings or holding trial on the merits, if necessary. A29, A40. On June 2, 1982, after briefing and argument, a panel of the Third Circuit issued a Judgment and Opinion affirming the trial court. A2, A32. Prior to the issuance of the mandate, the Petitioners filed a Petition for Rehearing and Rehearing En Banc, which Petition was denied by the Court on July 12, 1982. A34. The Court granted Petitioner's Application for a Stay of Issuance of Mandate, pending the filing of the within Petition for a Writ of Certiorari. A1.

REASONS FOR GRANTING THE WRIT

With this, the first case denying defendants in a criminal action their constitutionally protected right to counsel of their choice to present a common defense, it is time to confront directly and resolve the critical issue raised by the panel decision of the Third Circuit: will our Constitution permit the courts to preclude criminal defendants from presenting a common defense through retained counsel of their choice, given a knowing, voluntary and intelligent waiver of their Sixth Amendment rights, simply because the court perceives a potential conflict of interest lurking in the background, resulting from the sharing of information necessary to prepare the common defense. It is Petitioners' position that an interpretation of the Constitution precluding the presentation of a common defense through counsel of choice stands the Sixth Amendment's guarantees of effective assistance of counsel and the Fifth Amendment's guarantees of due process of law on their head, denying to Petitioners the lynchpin of their defense, despite a valid waiver.

A criminal defendant has a constitutionally protected right to be represented by retained counsel of his choice. Though as with all constitutional rights, this right is not absolute, it must necessarily have greater weight where retained counsel is chosen by defendants jointly charged in connection with the presentation of a common defense. A criminal defendant also has a constitutionally protected right to conflict-free counsel. Where these constitutionally protected rights may potentially clash, given the joint representation of criminal defendants seeking to present a common defense through counsel each has separately retained, it is the choice of each defendant to select which right should be vindicated, and not that of a court. Indeed, in the absence of an actual conflict of interest and given a valid waiver of any claim arising from potential conflicts of interest, a court should be powerless to preclude criminal defendants from having their common defense presented by retained counsel of their choosing.

The issues in this case, to quote from the panel opinion below, involve "[a] defendant's choice of counsel [which] is not to be dealt with lightly or arbitrarily". A10. Petitioners submit, however, that the panel opinion does indeed cast short shrift upon their choice of counsel, offending the pronouncements of this Court and directly conflicting with the opinions of all other circuits which have considered this issue.

The Panel Opinion Denying Petitioners the Counsel of Their Choice to Present Their Common Defense Due to Potential Conflicts of Interest, Despite a Valid Waiver of Such Conflicts, Is Inconsistent With the Decisions of This Court

The court below held that it had the power to disqualify counsel chosen and retained by Petitioners, finding that *potential* conflicts of interest existed which it deemed likely to arise at trial because of multiple representation. It is respectfully submitted that this holding is erroneous. Indeed, were it correct, an absolute ban on multiple representation of criminal defendants would be required since a potential for conflict is inherent in any such lawyer-client relationship, based upon the sharing of privileged information. In fact, a plain reading of the Supreme Court opinions in this area demonstrates that each Petitioner has a constitutional right to have a single law firm present a common defense. In order to comprehend the errors and misconceptions of the court below, it is necessary to trace the development of the law respecting the issues of multiple representation and conflicts of interest.

The holding that a potential conflict of interest warrants disqualification of counsel from multiple representation of co-defendants was the predicate for the Third Circuit's decision in *United States ex rel. Sullivan v.* Cuyler, 593 F. 2d 512 (3d Cir. 1979) (hereinafter "*Cuyler I*"). Two privately retained attorneys had represented both petitioner and two co-defendants in connection with state court murder trials. Sullivan raised no objection to

such representation, based, in part, on his inability to afford his own counsel. Sullivan was tried and convicted, after resting without presenting a defense. His co-defendants were later acquitted at separate trials.

After exhausting his state remedies, Sullivan filed a petition for habeas corpus arguing, *inter alia*, that counsel had a conflict of interest based upon their representation of his two co-defendants. The Third Circuit reversed the denial of the petition, finding that the mere possibility of conflict of interest resulting from multiple representation was sufficient to deprive a defendant of his right to effective assistance of counsel:

> "Numerous recent cases in this Circuit have repeated this standard and made clear that actual prejudice or conflict of interest need not be shown. The mere possibility, however, remote, is sufficient." *Cuyler I, supra,* 593 F. 2d 519-20.

On appeal, this Court specifically and unequivocally held that the standard enunciated by the Third Circuit in *Cuyler I* was erroneous. In *Cuyler v. Sullivan,* 100 S. Ct. 1708 (1980), (hereinafter *"Cuyler II"*), the Court held both that the Rule 44(c) inquiry is not constitutionally mandated,[4] and that multiple representation does not violate the Sixth Amendment absent an *actual* conflict of interest. *Accord: Holloway v. Arkansas,* 435 U. S. 475, 482 (1978). Respecting the latter point, *Cuyler II* held that a possibility of conflict from multiple representation is insufficient to warrant a conclusion that a lawyer's performance was adversely affected and/or ineffective:

> "We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to

4. "We conclude that the Sixth Amendment imposed upon the [state] trial court no affirmative duty to inquire into the propriety of multiple representation." *Cuyler II, supra,* at 1718. Although *Cuyler II* was decided prior to the effective date of Rule 44(c), the opinion referred both to the proposed rule and case law in reaching this holding. *Id.,* at 1716-1718.

demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler II, supra,* 100 S. Ct. at 1719. *Accord: Dukes v. Warden,* 406 U. S. 250 (1972).

Since, as *Cuyler II* holds, the presence of an actual conflict arising out of multiple representation and an adverse performance by counsel must occur before a claim of ineffective assistance may be colorably raised, it necessarily follows that no disqualification of counsel is warranted based upon a mere potential conflict of interest arising from multiple representation. Indeed, if the law were otherwise, the multiple representation of criminal defendants would be banned absolutely, as is noted in *Cuyler II* itself:

> "*Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. See 435 U. S. at 582. Since a possible conflict of interest inheres in almost every instance of multiple representation, . . . a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. Such a presumption would preclude multiple representation even in cases where '[a] common defense . . . gives strength against a common attack.' [*Holloway v. Arkansas,* 435 U. S. 475, 482-83 (1978)], quoting *Glasser v. United States,* 315 U. S. 60, 92 (1942) (Frankfurter, J., dissenting)." *Cuyler II, supra,* 100 S. Ct. at 1718.

No such absolute ban has ever been imposed or favorably viewed by this Court. Indeed, *Cuyler II* and *Holloway* suggest that the decision to have one firm represent codefendants and to present a common defense is itself constitutionally protected.

Since only an actual conflict of interest may permit a reversal of a conviction on Sixth Amendment grounds,

and since the Rule 44(c) inquiry is not even constitutionally mandated, *Cuyler II* strongly suggests, if not compels, that no court may deny a criminal defendant chosen counsel to present a common defense absent an actual conflict, especially where each defendant has made a valid waiver of conflict-free counsel. Indeed, every other Circuit which has considered this question has so decided.

Every Other Circuit Holds That Defendants' Choice of Counsel May Not be Undercut by the Court So Long as There Is a Valid Sixth Amendment Waiver, Even Absent a Common Defense

The panel opinion cited no circuit court authority supporting its holding. Indeed, it acknowledged that two other circuits had held to the contrary:

> "To the extent that the decision of two other circuit courts require district court acceptance of waivers in cases of potential or actual conflicts of interest, we respectfully disagree. *See, United States v. Armedo-Sarmiento,* 524 F. 2d 591 (2d Cir. 1975); *United States v. Garcia,* 517 F. 2d 272 (5th Cir. 1975)." A9.

Subsequent to the briefing below, other decisions have been issued, each of whose holdings are contrary to the panel opinion below so that the Third Circuit stands alone.

In *United States v. Curcio,* 680 F. 2d 881 (2d Cir. 1982), the court vacated an order precluding counsel from representing both or either defendant for want of an adequate opportunity to make a knowing and intelligent waiver of his right to conflict-free representation. In so holding, the court discussed the conflict issue, finding that it could be waived, relying on *Cuyler II*:

> "The principle that the right to separate representation may be waived finds its most recent support in the Supreme Court's decision in *Cuyler v. Sullivan,* 446 U. S. 335 (1980), in which the same pair of retained attorneys represented three defendants charged with

murder. The Court ruled that the mere fact of the multiple representation was not sufficient to establish a violation of Sixth Amendment rights, nor even to alert the state trial court that there might be need for an inquiry into potential conflicts of interest. The Court stated that '[a]bsent special circumstances, . . . trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.' *Id.* at 346-47 (footnote omitted). The Court construed its earlier decision in *Holloway v. Arkansas, supra,* as confirmation that multiple representation is not impermissible:

> *Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. See 435 U. S., at 482. Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel." *Curcio, supra,* 680 F. 2d at 886.

Holding that an attorney may represent more than one defendant in a criminal prosecution if the defendants so elect knowingly and wilfully, despite the potential conflicts lurking in the background, the court opined:

> Notwithstanding the considerable dangers, however, the teaching of the Supreme Court in *Glasser, Holloway,* and *Cuyler* is that defendants may, if they act with their eyes open, elect to be represented jointly by a single attorney. The recently adopted Fed. R. Crim. P. 44(c), . . . does not eliminate the defendant's power to waive his right to be represented by a conflict-free

attorney. While the rule imposes on the trial court the duty to make prompt inquiries and to advise the jointly represented defendants as to their rights to separate representation, it does not forbid joint representation. It merely requires that where a conflict may arise the court shall take such measures as may be appropriate to protect each defendant's right to counsel. Given the constitutional dimension of the defendant's right to counsel of his own choosing, if the defendant makes a knowing and intelligent election to pursue that right in preference to his right to an attorney of undivided loyalty, disqualification would not protect the Sixth Amendment right that the defendant asserts and would not be appropriate. *Curcio, supra,* 680 F. 2d at 887-88.

In *United States v. Cunningham,* 672 F. 2d 1064 (2d Cir. 1982), the court reversed the pretrial disqualification of defendants' counsel due to the rejection of a Sixth Amendment waiver, even though an actual conflict of interest was there presented. Observing that the right of a criminal defendant to be represented by retained counsel is "a right of constitutional dimension", and that such right ought "not be unnecessarily obstructed by the Court", *Id.* at 670, the court held that where the constitutional rights of the defendant to choice of retained counsel and conflict-free representation clash, he ought choose which takes precedence:

> "[I]f Cunningham's right to counsel of his choice conflicts with his right to an attorney of undivided loyalty, we think the choice as to which right is to take precedence should be left to Cunningham and not be dictated by the government." *Id., supra,* at 1079.[5]

5. *See, Curcio, supra,* 680 F. 2d at 885. "*Cunningham* thus established that where the former client does not seek disqualification and his rights can be adequately safeguarded, the interests of the former client, the interest of the public in the integrity of the judicial system, and the interests of the defendant are best protected by

In *Smith v. Bordenkircher*, 671 F. 2d 936 (6th Cir. 1982), the court held that a lawyer representing multiple criminal defendants need not withdraw as counsel for remaining defendants where one turned states' evidence, thus creating a potential conflict of interest, relying on *Cuyler II*:

> "In *Cuyler*, the Supreme Court noted that although a conflict of interest may be possible in every instance of multiple representation, a reviewing court cannot presume that the mere 'possibility for such conflict has resulted in ineffective assistance of counsel.' *Cuyler*, 100 S. Ct. at 1718. If a defendant does not raise the conflict issue at trial, then '[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.' *Id.* 100 S. Ct. at 1719. This two part test does not permit the formulation of strict rules against a lawyer's continued representation of remaining co-defendants if an indicted former client pleads guilty and cooperates with the prosecution. Rather, the *Cuyler* test directs us to determine, on the facts of each case, whether there is an actual conflict of interest and whether that conflict has caused ineffective performance in violation of the provisions of the Sixth Amendment. . . ." *Smith, supra*, 671 F. 2d at 987.

In *United States v. Agosto*, 675 F. 2d 965 (8th Cir. 1982), six defendants represented by three counsel, appealed from trial court disqualifications based upon conflict of interest claims, arising both from prior representations of interested persons and multiple representations of co-defendants. In this latter regard, the *Agosto* court held that the trial court abused its discretion by disqualify-

5. (Cont'd.)

honoring the defendant's knowing and intelligent decision to waive his right to an attorney of individual loyalty in order to retain the attorney of his choice."

ing counsel due to the possibility that co-defendants multiply represented could present inconsistent defenses, reasoning that a common defense rendered such concern moot:

> "In the criminal context, disqualification on the basis of the attorney's receipt of privileged information from a codefendant formerly represented by that attorney should only be considered upon a clear showing that the present and former clients' interests are adverse. Here, there has been no such showing. Gustafson, Norris and Agosto all contend that all of the defendants intend to present a joint defense, and that there, therefore, is no adversity of interests. While defendants Bruins and Newstrum are not on the record as joining in this contention, it appears that they were never asked to state their position. We find that the district court erred in rejecting appellants' assertion of intent to present a joint defense without conducting further inquiry into its validity. On remand, we direct that further inquiry take place." *Agosto, supra,* 675 F. 2d at 973.

Indeed, even were a common defense not advanced, and an actual conflict presented, the court nonetheless refused to disqualify counsel:

> "Assuming that after further inquiry the district court is satisfied that a clear showing has been made that the interests of defendants Bruins and Newstrum are adverse to the interest of Gustafson, we instruct the district court to consider whether there exists a means of eliminating the potential conflict less burdensome that [sic] disqualification. As we noted earlier, a client may consent to his former attorney's representation of adverse interests. Gustafson contends that Bruins and Newstrum have no objection to Walters' continued representation, and proposes employment of a backup attorney to cross-examine Bruins and Newstrum and do whatever else would be neces-

sary to alleviate the conflict should their interests ever prove adverse.[7] We note that Bruins and Newstrum never filed a motion for Walters' disqualification and never actively supported the government's motion. Under these circumstances, we hold that the district court should inquire of defendants Newstrum and Bruins as to their willingness to consent to Walters' continued representation of Gustafson, and use of backup counsel.[8] If Newstrum and Bruins are willing to consent, we see no reason to reject Gustafson's proposal to employ a backup counsel as a satisfactory resolution of the conflict. If they do not consent, however,[9] then we concur in the district court's exercise of discretion and disqualify attorney Walters.

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7. There is precedent for Gustafson's proposal. *See United States v. Jeffers*, 520 F. 2d 1256, 1266 (7th Cir. 1975), *cert. denied*, 423 U. S. 1066 (1976); *Tague, Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 Geo. L. J. 1075, 1115 (1979).

8. If Bruins and Newstrum do consent, they will in effect waive any future objections they may have to the fairness of their trial arising as a result of Walters' continued representation of Gustafson and employment of backup counsel. Thus, in order for the consent to be effective, we hold that it should fulfill all the standards of a knowing and intentional waiver of a constitutional right.

9. If the district court determines that the interests of the defendants are not adverse, it will only be because all defendants, including Bruins and Newstrum, represent that they intend to present a joint defense and that there are, therefore, no conflicts of interest. Under these circumstances, we consider it appropriate to require Bruins and Newstrum to execute an informed consent to Walters' continued representation of Gustafson, and use of backup counsel if necessary. In this way, the interest of the district court in insuring the integrity of the proceedings from post-conviction attack will be protected should the defendants prove wrong in their assessment of trial strategy. *Agosto, supra*, 675 F. 2d at 973-74."

Thus, the Second, Fifth, Sixth and Eighth Circuits each hold that a pretrial waiver of even an actual conflict of interest is binding and valid, in order to permit a defendant to proceed with counsel of his choice.[6] None of these cases, save *Agosto*, dealt with common defenses. Where trial strategy is bottomed on a common defense, by definition, there can be no conflicts of interest. *Agosto, supra*, 675 F. 2d at 975. Therefore, the impropriety of the panel opinion below is even more glaring.

Rule 44(c) Does Not Permit a Court to Undercut Petitioners' Constitutionally Protected Choice of Retained Counsel

The panel below held that despite a valid Sixth Amendment waiver and given the absence of any actual conflict of interests, nonetheless the court could disqualify counsel pursuant to Fed. R. Crim. P. 44(c):

> "It does not follow, however, that because defendants may waive the right to separate representation free from potential conflicts, they have an absolute right, constitutional or otherwise, to have such waiver accepted by a court. A truly knowing and intelligent waiver accepted by the court will isolate a conviction from later attack. But the perspective of a trial court judge need not be limited to a concern not to have a conviction overturned. . . ."
>
> "Where, however, the materialization of actual conflict is very likely, disqualification of defense counsel and ordering defendants to retain separate counsel are appropriate measures to be taken pursuant to Fed. R. Crim. P. 44(c)." A9, A10.

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6. Interestingly, the Third Circuit has so held as well, in *United States v. Laura*, 667 F. 2d 365, 371-73 (3d Cir. 1981). Thus, the panel below necessarily reasoned that a waiver, sufficient to preclude a post-conviction attack for actual prejudice shown, is somehow insufficient to support a pretrial constitutionally protected choice to have retained counsel present a common defense.

In so holding, the panel improperly construed a procedural rule to abrogate the constitutional rights possessed by petitioners.

As is set forth in *Cuyler II, supra,* the Rule 44(c) inquiry is *not* of constitutional dimension. Were it otherwise, then the state court in *Cuyler* would have been compelled, on Sixth Amendment grounds, to hold a Rule 44(c) hearing. Thus, Rule 44(c) merely requires that the court exercise its supervisory powers to personally advise defendants of their right to the effective assistance of counsel, including separate representation, where two or more defendants have been jointly charged and are represented by the same retained counsel. The Rule goes on to state:

> "Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

The Rule is silent respecting "appropriate measures" where there is good cause to believe a conflict of interest is likely to arise. Nonetheless, counsel is unaware of any other case which approves the appointment of separate counsel for joint defendants over the objection of co-defendants after waiver and absent an actual conflict, nor does the committee note,[7] or cases cited therein, so suggest.

Moreover, it necessarily follows that the Rule itself cannot be authority for the harsh sanction imposed by the Court below, since the Rule was not intended to affect substantive rights of constitutional dimension but was rather intended to secure uniformity and simplicity of criminal procedures and to protect a defendant's constitutional rights to choice of retained counsel and to fair and effective representation. In the Order of the Supreme Court adopting the Rules, Mr. Justice Frankfurter stated, "that

7. The note, of course, has no more weight than a legislative history of a statute, and cannot be used to expand or contract the clear intendment of the Rule. *United States v. Mihalopoulos,* 228 F. Supp. 994 (D. D. C. 1964).

the federal courts have power, or may be empowered, to make rules of procedure for the conduct of litigation has been settled for a century and quarter (*Wayman v. Southard,* 10 Wheat. 1, 6 L. Ed. 253)." Similarly, in *United States v. Debrow,* 346 U. S. 374 (1953), the court stated:

> "The Federal Rules of Criminal Procedure . . . were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure." *Id.* at 376.[8]

In *United States v. Schwartz,* 372 F. 2d 678 (4th Cir. 1967), the court echoed the *Debrow* theme, stating:

> "[The Rules of Criminal Procedure] are not constitutional requirements but are procedural merestones established . . . and effectuated by the Supreme Court in its supervision of criminal proceedings in the Federal Courts. (Citations omitted). Thus, we are dealing exclusively with a procedural question." *Id.* at 682.

Since the Rule does not and cannot expand the power of the trial court to order appointment of separate counsel, the "appropriate measures" which may be taken where there is good cause to believe a conflict likely to arise cannot include the disqualification of counsel here ordered.[9]

Indeed, Rule 44(c) cannot deprive Petitioners of their Sixth Amendment right to retain counsel of their choice. In *United States v. Armedo-Sarmiento,* 524 F. 2d 591 (2d

8. *Accord: United States v. Gray,* 448 F. 2d 164, 167 (9th Cir. 1971), "[The Rules of Criminal Procedure] were designed to simplify existing procedure and to make uniform certain practices in all district courts."

9. Petitioners submit that "appropriate measures" authorized by the Rule where a conflict of interest is found likely to arise include specific advice as to the nature, purpose, and scope of the right to separate counsel; the right to have counsel appointed if financial considerations are at issue; and the taking of a valid waiver in order to assure that a defendant's right to counsel of his choice is preserved.

Cir. 1975), the Second Circuit reversed an order disqualifying retained counsel on conflict grounds, stating:

> "[T]he district court did not give sufficient weight to the appellants' rights. Although the right to an attorney of one's choosing is not unlimited, the Sixth Amendment does give some protection to a criminal defendant's selection of retained counsel. *See United States v. Wisneiwski*, 478 F. 2d 274, 285 (2d Cir. 1973); *United States v. Sheiner*, 410 F. 2d 337, 342 (2d Cir.) *cert. denied*, 396 U. S. 825, (1969); *United States ex rel. Davis v. McCann*, 386 F. 2d 611, 618 (2d Cir. 1967), *cert. denied*, 390 U. S. 958 (1968). Cf. *Faretta v. California*, 422 U. S. 806 (1975), holding that there is a constitutional right to proceed pro se, and observing that the right to manage one's own defense is at the heart of the Sixth Amendment guarantees. . . . The client, however, may waive his Sixth Amendment rights to effective assistance of counsel . . . just as he may knowingly and intelligently waive any constitutional rights." *Id.* at 592.

In *United States v. Garcia*, 517 F. 2d 272 (5th Cir. 1975), city police officers charged with federal offenses including 18 U. S. C. §§ 241 and 242, obtained private counsel. Two officers retained one attorney; the remaining seven retained two attorneys who, in addition, represented fifteen other police officers who would likely testify at trial, many of whom had testified before the grand jury.

In reversing the trial court's order disqualifying the three lawyers from any representation of the nine defendants, the court assumed actual conflicts engendered from multiple representation, but held nonetheless that such conflicts could be waived:

> "We hold that if, as a matter of fact, a defendant after thorough consultation with the trial judge knowingly, intelligently and voluntarily wishes to waive [the right to conflict-free representation], the Constitution does not prevent him from so doing." *United*

States v. Garcia, supra, 517 F. 2d at 278. *Accord, United States v. Curcio; United States v. Cunningham, supra.*

Thus, all these cases have placed their imprimatur upon a defendant's right to waive an actual conflict engendered by multiple representation after an inquiry, patterned on Rule 44(c), establishing the constitutionally requisite predicates for such waiver. Therefore, it is clear that Rule 44(c) does not expand upon the powers of the trial court to disqualify counsel from multiple representation of co-defendants in a criminal action; rather, it merely sets forth procedures to be followed in order to assure that the waiver, as here, meets constitutional standards.

The Opinion Below Precludes the Presentation of a Common Defense

Both the panel and the district court articulated that the potential conflict causing them the most concern was that occasioned by counsel's acquisition of privileged information by dint of the lawyer/client relationship.

The major section of Petitioners' appellate brief discussed the facts that whether Petitioners are represented by one firm or separate firms:

> (a) any privileged information shared among counsel raises the self-same potential conflict; and
>
> (b) the price paid for sharing privileged information is the waiver of the attorney/client privilege respecting that information should the common defense break down.[10]

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10. This latter point was seemingly accepted by the panel which set forth in a footnote, "6. *See, e.g., In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974,* 406 F. Supp. 381 (S. D. N. Y. 1975) (attorney-client privilege will not apply among joint defendants and their attorneys in later controversies between or among those clients, even though shared information may initially be insulated from exposure beyond confines of the group)." A10. The former point was not discussed by the panel.

It necessarily follows, therefore, that the panel opinion serves to preclude the presentation of a common defense because such defense necessarily hinges upon the complete sharing of privileged communications made to counsel, regardless of the number of firms representing co-defendants. Thus, while couched in terms of multiple representation, the panel opinion actually precludes the presentation of a common defense, relying upon a procedural rule to abrogate the strategy constitutionally accepted by this Court. *See Glasser, supra, Holloway, supra.*

The Panel Opinion Undermines the Ability of Clients to Consult With and Retain Counsel of Their Choice

The panel opinion implies a questioning of the initial decision to present a common defense:

> "Once each defendant has consulted with his own counsel, a truly independent decision may then be made whether or not to continue with a common defense strategy. . . ." A10. Also see A43.

Since the record is clear that the decision to present a common defense was made by each Petitioner prior to meeting with counsel, and that after repeated meetings with counsel, both separate and joint, the decision to proceed with a common defense was reaffirmed by each Petitioner, any suggestion that the common defense decision was other than independently made by each Petitioner is both specious and inflammatory.

As set forth above, each Petitioner determined that he should present a common defense in order to gain strength against a common attack, such decisions being made four months prior to the institution of criminal proceedings. Each chose the firm of Sprague & Rubenstone as the vehicle through which his desires would be best implemented, based upon his knowledge of the firm's reputation and his confidence in its members. To whom would the panel have Petitioners go to discuss their case? It

would appear that each Petitioner would have to consult with a separate lawyer in whom he had less or no trust and confidence in order to obtain permission to have Sprague & Rubenstone present a common defense. Should second or third choice counsel advise that no common defense be presented, why should Petitioners accept such conclusion? Finally, who should pay for the cost to Petitioners of consulting with unchosen counsel for the receipt of advice they do not wish to obtain from that source?

Absent an actual conflict of interest, there is no constitutional value offsetting each Petitioner's constitutionally protected right to counsel of his choice. As such, the court's decision to disqualify counsel in this case constitutes a flagrant substitution by the panel of its judgment for that of the Petitioners. Since the panel cannot know and is not entitled to know the predicates upon which each Petitioner's judgment is based, such action by the panel is nothing more than a bald and unwarranted interference with each Petitioner's Sixth Amendment rights. In so acting, the panel, in fact, has affirmed the trial court's dictation to each Petitioner, over his objection, of what his best interests are and how they will best be served. Such a paternalistic posture is offensive, and, if permitted to stand, would turn the concept of supervisory powers on its head.

Moreover, since courts permit criminal defendants to waive myriad Fourth, Fifth and Sixth Amendment rights even absent consultation with any counsel, and, respecting the Fourth Amendment, without a requirement that such defendant be made aware of the extent of his rights, the panel decision seems peculiarly inappropriate as well as substantively incorrect.

Resolution of the Issues Posed Herein Will Substantially Diminish the Workload of all Federal Courts

The 1981 Term of the Supreme Court contained no less than fourteen cases raising post-conviction issues re-

sulting from multiple or joint representation.[11] One case posed the question whether a pretrial disqualification of counsel with an actual conflict of interest, absent a waiver or common defense, is a final, appealable order. *Greger v. United States*, No. 81-1357, *cert.* petition filed, 50 U. S. L. W. 3722 (January 19, 1982).

Obviously, the administrative burden on this Court imposed from consideration of post-trial multiple representation cases is considerable. A ruling on the merits of Petitioners' claim will have the salutory effect of reducing the docket of this Court and all other federal tribunals. If this Court holds that absent an actual conflict, pretrial waivers of conflict-free counsel are valid, then the sole question which may be subsequently raised is that respecting the sufficiency of the waiver. The concomitant reduction in dockets and complexity of issues posed in each docketed case will be considerable throughout the federal system.

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11. *Crossman v. United States*, No. 81-1825, *cert. denied*, 50 U. S. L. W. 3916, May 18, 1982; *McLister v. United States*, No. 81-1276, *cert. denied*, 50 U. S. L. W. 3695, March 1, 1982; *Snyder v. Ohio*, No. 80-2199, *cert. denied*, 50 U. S. L. W. 3246, October 5, 1981; *Myhrvold v. Sullivan*, No. 81-377, *cert. denied*, 50 U. S. L. W. 3351, November 2, 1981; *Monius v. United States*, No. 81-948, *cert. denied*, 50 U. S. L. W. 3487, December 14, 1981; *Monroe v. New York*, No. 81-1188, *cert. denied*, 50 U. S. L. W. 3669, February 22, 1981; *Hopper, Warden v. Johnson*, No. 81-60, *cert. denied*, 50 U. S. L. W. 3352, November 2, 1981; *Balkcom v. Baty*, No. 81-1587, *cert. denied*, 50 U. S. L. W. 3943, June 1, 1982; *Leader v. United States*, No. 81-1165, *cert. denied*, 50 U. S. L. W. 3591, January 25, 1982; *Broderick v. United States*, No. 81-1647, *cert. denied*, 50 U. S. L. W. 3838, April 19, 1982; *Horowitz v. Florida*, No. 81-254, *cert. denied*, 50 U. S. L. W. 3300, October 19, 1981; *Scully v. Camera*, No. 81-790, *cert. denied*, 50 U. S. L. W. 3487, December 14, 1981; *Duckworth v. Serrano*, No. 80-2041, *cert. granted*, judgment vacated and case remanded with per curiam opinion, 50 U. S. L. W. 3297, October 19, 1981; *Duckworth v. Cowell*, No. 81-1038, *cert. granted* and judgment vacated and case remanded, 50 U. S. L. W. 3715, March 8, 1982.

If, on the other hand, this Court holds that Petitioners may not present a common defense through unitary counsel, despite no actual conflict of interest and given a valid waiver, then no such issue will continue to clog the dockets of this Honorable Court and the other federal tribunals, for counsel will per force alter their manner of providing criminal representation in common defense cases.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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Appendix.

ORDER OF THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT ENTERED JULY 23, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3116

UNITED STATES OF AMERICA

v.

FLANAGAN, ROBERT
KEWESHAN, JAMES
LANDIS, SIDNEY
McNAMEE, THOMAS,

Appellants

(D. C. Crim. No. 81-00270-01/4)

It appearing that on July 19, 1982, appellants filed a motion for stay of mandate to and including September 19, 1982, and the Clerk's Office having issued the mandate on July 20, 1982, in error;

It is ORDERED that the mandate issued July 20, 1982, be, and is hereby recalled.

For the Court,

/s/ SALLY MRVOS
Sally Mrvos
Clerk

Dated: July 23, 1982

PANEL OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED JUNE 2, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3116

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS and THOMAS McNAMEE,
Appellants

(D.C. Criminal No. 81-00270-01/04)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: May 11, 1982

Before: GIBBONS and HUNTER, *Circuit Judges* and THOMPSON, *District Judge* *

(Opinion Filed: June 2, 1982)

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Opinion of the Court

GIBBONS, *Circuit Judge*:

This appeal presents questions concerning the power of a district court to disqualify joint counsel for criminal defendants under a recently enacted section of Rule 44, Federal Rules of Criminal Procedure. After finding that a conflict of interest was very likely to arise, that each defendant was aware of the potential conflicts, and that each defendant had voluntarily and intelligently chosen to

waive any claim of conflict of interest, the district court ruled that it need not accept the defendants' waiver and proceeded to disqualify the defendants' chosen counsel from the case entirely. We affirm.

I.

The defendants, Robert Flanagan, James Keweshan, Sidney Landis and Thomas McNamee, are all police officers employed by the Philadelphia Police Department as members of a so-called "grandpop" squad that serves to decoy and apprehend street criminals. They each have been charged in a single indictment with conspiracy to violate the civil rights of citizens, 18 U.S.C. § 241, and also have been charged in various other counts of the same indictment with substantive violations of those rights. 18 U.S.C. §§ 2, 242. The government charges that the defendants conspired to arrest persons, under color of law, without probable cause, and that various groups of the defendants falsely arrested and physically abused eight persons in violation of their civil rights.

The defendants chose to present a common defense, and all retained the law firm of Sprague & Rubenstone (the firm) to represent them. Pursuant to a government request and in accordance with Fed. R. Crim. P. 44(c), the district court conducted a hearing to determine whether defendants were aware of the risks of joint representation and of their rights to separate representation. The court found that each defendant had already been apprised by an attorney from the firm of a number of potential risks associated with joint representation. The court then questioned each defendant, under oath, to ascertain whether he understood those risks, and whether financial considerations had played a role in the choice of counsel.

The court found that each defendant was completely aware of the potential conflicts of joint representation and that each defendant had voluntarily and intelligently chosen to waive any claim of conflict of interest in electing to be represented by one counsel. But because the court

also found that a conflict of interest was very likely to arise in the course of the proceedings, it held that the waivers need not be accepted, and ordered that the firm should be disqualified from representing any of the defendants. Defendants appealed [1] and the district court has granted a stay of its proceedings pending disposition of the appeal.

II.

A new section of Rule 44, Federal Rules of Criminal Procedure, concerning Right to and Assignment of Counsel, became effective on December 1, 1980:

> *Joint representation.* Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Fed. R. Crim. P. 44(c). The district court's disqualification order was made pursuant to the final sentence of this rule. Thus in order to reverse we would have to find either that there is good cause to believe that no conflict

1. We have jurisdiction to hear appeals from district court orders disqualifying counsel under 28 U.S.C. § 1291 inasmuch as such orders are "collateral orders" within the meaning of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). *E.g.*, United States v. Miller, 624 F.2d 1198, 1199 (3d Cir. 1980); IBM v. Levin, 579 F.2d 271, 277-78 (3d Cir. 1978). Those holdings are not affected by Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 372 n.8 (1981).

of interest is likely to arise, or that the measures taken were an abuse of discretion.

A.

Although the defendants do not dispute the existence of potential conflicts of interest in joint representation by the firm, it is nevertheless important to review the nature of these potential conflicts in order to determine whether the court's action was appropriate under the circumstances.

Each defendant is not charged in every count of the indictment. Two are charged in all counts, while in five of thirteen counts only three are charged. This varying amount of involvement was a basis for defendants' motion to dismiss the first count (conspiracy) of the indictment. Defendants Landis, McNamee and Keweshan also moved for sentence, contending that their role was only to respond to a signal from Flanagan (the decoy) and that prejudice would arise if they were forced to stand trial with him. Lastly, as the district court points out and as the defendants have recognized, oral statements made by the defendants in the course of their decoy employment are essential to prove the requisite state of mind of each defendant. Defense counsel would ordinarily want to cross-examine any hearsay witness as to a specific defendant. Yet a joint counsel, privy to confidences of another defendant that might at the same time tend to implicate the latter while absolving the former, would find himself in an awkward situation.

All these factors indicate conflicts that joint defense counsel will very likely face in presenting an adequate defense for each defendant. Some, such as inability to argue the innocence or lesser culpability of one defendant based upon the guilt or greater culpability of the other, are inherent in the situation. Some may arise due to future events. For example, the government may offer immunity to one defendant in return for testimony against the others. In one sense these problems may not yet have arisen and thus the conflicts of interest may be

deemed merely potential. Indeed, it is conceivable that it will never be in one of the defendants' interest to adopt a strategy that would have adverse consequences for another defendant. A common defense throughout the proceedings might truly offer each the best opportunity for acquital. On the other hand, the present likelihood of a future actual conflict of interest, which could result in the inadequate representation of some defendants, must be considered by defendants' counsel [2] and by the court,[3] and brought to the defendants' attention.

B.

In this instance, both the joint counsel and the district court carefully brought various likely conflicts to the attention of the defendants. The court found that the defendants have voluntarily and intelligently waived any claim of conflict of interest and have elected to be represented by the firm.[4] The defendants now contend that this

2. *See ABA Standards Relating to the Prosecution Function and the Defense Function* § 3.5(b) (1971) at 211:

> The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

See also Code of Professional Responsibility, DR 5-105 (Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer).

3. *See* Fed. R. Crim. P. 44(c), supra.

4. The government suggests that under the circumstances of this case, defendants could not have made knowing and intelligent waivers of their rights to conflict-free representation. *See* United States v. Quinones, 613 F.2d 47 (3d Cir.), *cert. denied*, 446 U.S. 937 (1980); United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978); United States v. Helton, 471 F. Supp. 397 (S.D.N.Y. 1979). It also suggests that the waivers by defendants were merely conditional.

waiver entitles them to such joint representation and that the district court may not interfere with their choice.

The sixth amendment guarantee of effective assistance of counsel does not provide defendants with an absolute right to the lawyer of their choice. *Davis v. Stamler,* 650 F.2d 477 (3d Cir. 1981); *United States v. Dolan,* 570 F.2d 1177 (3d Cir. 1978). Although the sixth amendment and the due process clause of the fifth amendment do afford some protection for a defendant's decision to select a particular attorney, that protection goes no further than preventing arbitrary dismissal of the chosen attorney, and providing a fair opportunity to secure counsel of his choice. *Davis v. Stamler, supra.* Defendants urge, nevertheless, that the district court must accept their valid waiver of conflict-free representation, at least in instances where the conflicts are merely potential and not present.

Much of the legal precedent dealing with the right to conflict-free representation and with the waiver of that right has been announced in cases reviewing prior convictions. In *United States ex rel. Hart v. Davenport,* 478 F.2d 203 (3d Cir. 1973), for example, this court recognized that the right to assistance of counsel unimpaired by conflicts arising from joint representation, may be waived, but held the prior trial to have been constitutionally defective where the record was silent as to any such waiver. In *Cuyler v. Sullivan,* 446 U.S. 335 (1980), the Supreme Court reversed this court's holding with respect to one aspect of such post-conviction challenges. The Court held that in order to establish a sixth amendment violation, a defendant who raised no objection at trial must demonstrate that an actual—not merely potential—conflict of interest adversely affected his lawyer's performance. 446 U.S. at 348. In the course of its discus-

4. (Cont'd.)

U.S. Brief at 18-23. We see no reason, however, to doubt the district court's characterization of the waivers. In view of our disposition of this case, in any event, there is no reason to question that characterization.

sion, when commenting that multiple representation may be valuable in presenting a common defense against a common attack, the Court acknowledged that waiver of potential conflicts is possible. *Id. See also Holloway v. Arkansas,* 435 U.S. 475, 482-83 (1978); *Glasser v. United States,* 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting). After *Cuyler v. Sullivan,* this court refused to set aside a conviction and to allow withdrawal of a guilty plea when the defendant had knowingly and intelligently waived her right to separate counsel. *United States v. Laura,* 667 F.2d 365, 371-73 (3d Cir. 1981).

It does not follow, however, that because defendants may waive the right to separate representation free from potential conflicts, they have an absolute right, constitutional or otherwise, to have such waivers accepted by a court. A truly knowing and intelligent waiver accepted by the court will insulate a conviction from later attack. But the perspective of a trial court judge need not be limited to a concern not to have a conviction overturned.[5]

In *United States v. Dolan,* 570 F.2d 1177 (3d Cir. 1978), this court held that a trial court need not accede to a waiver of conflict of interest when faced with an actual serious conflict of interest on the part of an at-

5. *See generally* Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney,* 62 Minn. L. Rev. 119 (1978). To the extent that the decisions of two other circuit courts require district court acceptance of waivers in cases of potential or actual conflicts of interest, we respectfully disagree. *See* United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975). The independent constitutional right to represent oneself in a criminal trial recognized in *Faretta v. California,* 422 U.S. 806 (1975), does not imply a constitutional right to waive conflict-free representation by counsel. A defendant's decision to proceed with joint counsel in the face of possible conflicts implicates more considerations and affects more people than does a decision to proceed *pro se. See Geer, supra,* at 158-59.

torney representing two co-defendants. In addition to the trial judge's interest in being free from post-conviction attacks, we mentioned the court's concerns about breaches of professional ethics and about respect for the integrity of the court. *Id.* at 1184.

In *Dolan,* we stressed that the trial court was faced with "an actual serious conflict of interest, rather than a mere possibility, . . ." *Id.* That, however, should not be taken to mean that the trial court must accede to a waiver when the conflict is anything short of actual. In this case the trial court found, and the defendants do not dispute, that a conflict of interest is very likely to arise. The trial court expressed its concern for the professional ethical standards to which defense counsel should be held, and questioned whether in this case the firm was even in a position to advise the defendants fully of the possible conflicts in view of the stated ignorance of government strategy regarding individual defendants. Finally, the trial court expressed its concern that the likely conflicts might well develop into actual conflicts before the trial came to a close, conceivably resulting in defendants' motions for a mistrial.

A defendant's choice of counsel is not to be dealt with lightly or arbitrarily. That choice should not be interfered with in cases where potential conflicts of interest are highly speculative. Where, however, the materialization of actual conflict is very likely, disqualification of defense counsel and ordering defendants to retain separate counsel are appropriate measures to be taken pursuant to Fed. R. Crim. P. 44(c). Once each defendant has consulted with his own counsel, a truly independent decision may then be made whether or not to continue with a common defense strategy in light of the hazards that such a strategy may entail.[6]

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6. *See, e.g., In re* Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381 (S.D.N.Y. 1975) (attorney-client privilege will not apply among joint defendants and their attorneys in later controversies between or among those clients, even

Appellants contend that even if joint representation were inappropriate, the firm should not have been disqualified from representing any of the defendants. The potential for conflict arising from the firm's receipt of confidential information from all the defendants, and its obligations in defending just one of the defendants, perhaps at the expense of the others, is obvious. While complete disqualification may not be required in every case where a potential conflict of interest is likely to arise, it is one of the measures committed to the district court's discretion by Rule 44(c). There was no abuse of discretion in this instance.

III.

The order of the district court disqualifying the firm of Sprague & Rubenstone from representing any of the four defendants and requiring that each defendant be separately represented will be affirmed.

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6. (Cont'd.)

though shared information may initially be insulated from exposure beyond confines of group).

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 2, 1981

United States District Court,
E. D. Pennsylvania.

Crim. No. 81-270.

UNITED STATES of America

v.

Robert FLANAGAN, James Keweshan,
Sidney Landis, Thomas McNamee.

Dec. 2, 1981.

Luther E. Weaver, Asst. U. S. Atty., Philadelphia, Pa., for plaintiff.

Richard A. Sprague, Bruce L. Thall, Philadelphia, Pa., for defendants.

Opinion

LUONGO, *District Judge.*

Presently before me is the Government's motion to prohibit the law firm of Sprague and Rubenstone from representing all four defendants in this criminal case. The defendants, Robert Flanagan, James Keweshan, Sidney Landis and Thomas McNamee, all police officers employed by the Philadelphia Police Department, are each charged in a single indictment with conspiracy to violate the civil rights of citizens. 18 U.S.C. § 241. The indictment also charges substantive violations of citizens' civil rights, *see* 18 U.S.C. § 242, by Flanagan (Counts Two through Thirteen), McNamee (Counts Two through Thirteen), Landis

(Counts Four through Thirteen), and Keweshan (Counts Two through Seven, and Eleven through Thirteen).

The defendants are members of a so-called "grandpop" squad, a decoy squad engaged in undercover operations to ferret out street crime. Typically, defendant Flanagan would pose as the decoy, with defendants Keweshan, Landis and McNamee as his backup. After being accosted and robbed by an assailant, Flanagan would signal the backup team by yelling: "Give me back my money." Keweshan, Landis and McNamee would then close in and make the arrest. The Government charges that over a period of about 17 months the defendants conspired to violate citizens' civil rights by arresting persons, under color of law, without probable cause, and that varying combinations of the defendants did in fact falsely arrest and/or physically abuse eight persons in violation of their civil rights.

Pursuant to the Government's request, and in accordance with Fed.R.Crim.P. 44(c),[1] a hearing was held on November 12, 1981, to inquire whether defendants were aware of (1) the risk of joint representation, and (2) their right to separate representation. Each of the defendants was present at the hearing. Bruce Thall and James Leonard from the firm of Sprague and Rubenstone ap-

1. Fed.R.Crim.P. 44(c), which became effective December 1, 1980, provides:

> (c) *Joint Representation.* Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

peared on behalf of the defendants. At that time, Mr. Thall informed the court that, after extensive discussions with each defendant concerning the risks and pitfalls of joint representation, each still wished to be represented by the firm of Sprague and Rubenstone.

Among the areas which Mr. Thall stated had been discussed with each defendant were the following:

(1) Opening and closing statements—Unlike separate counsel, joint counsel would not be able to set one defendant apart from another.

(2) Sentencing—In the event that more than one defendant were convicted, joint counsel could not argue that one defendant was more or less culpable than another.

(3) Spillovers—Possibility that jury might infer from joint representation that if one defendant is found guilty, the others must be also.

(4) Possible grants of immunity—Each defendant was told that the Government could offer one of the defendants immunity on the condition that he testify against the others, thus interfering with a joint trial strategy.

(5) Nature of the evidence—It was explained to each defendant that the Government might introduce more evidence tending to implicate defendant Flanagan, and that as a result:

(a) the jury might infer that the others were also guilty because of joint representation,

(b) defense efforts might be more concentrated toward the defense of Flanagan.

(6) Right to testify—If one defendant exercised his right to testify on his own behalf and one or more of the others did not, the jury, from the fact of joint representation alone, might infer guilt on the part of

those not testifying. Also, on cross-examination, the defendant who exercised his right to testify could be questioned as to his knowledge of activities involving the other defendants.

(7) Character and reputation testimony—Each was informed that if the defense offered character or reputation testimony on behalf of some but not all defendants, the jury might infer from the fact of joint representation that the character or reputation of the other defendants is undesirable.

(8) Right to separate counsel—Each defendant was apprised of his right to separate counsel, and that, if he could not afford counsel, the court would appoint counsel for him.

After Mr. Thall completed his outline of the areas discussed with the defendants, I questioned each defendant, individually and under oath, to ensure that each was aware of the potential conflicts that very likely could arise in this case. In addition to questioning the defendants on matters which had been explored by counsel, I also ascertained that each defendant understood that separate counsel could present a united defense strategy but, unlike joint counsel, could present alternative defenses as well. More importantly, I assured myself that financial considerations played no part in defendants' choice of joint counsel. Defendants advised me that their legal expenses were being paid by their union, the Fraternal Order of Police. Further, I advised each defendant that, if I ordered separate counsel and the union refused to defray the cost of such counsel, I would appoint counsel for them. Finally, in the presence of the court and defense counsel only, each defendant was given the opportunity to explain in his own words why, in light of the several risks created by joint representation, he wished to be represented jointly with the other defendants.

At the conclusion of the hearing, I found that (1) a conflict of interest was very likely to arise in the course of the proceedings against defendants; (2) each defendant was fully and completely aware of the potential conflicts; and (3) each defendant, without financial pressure, had voluntarily and intelligently chosen to waive any claim of conflict of interest and elected to be represented by one counsel. Defense counsel and the Government were then instructed to brief the question of whether I must accept the defendants' waiver, notwithstanding the conflict of interest that I find is very likely to arise. In addition, I asked the parties to address the question of whether I must disqualify the firm of Sprague and Rubenstone from the case entirely, in the event that I order that each defendant be separately represented.

Both sides have now filed memoranda of law. Since defense counsel concedes[1(a)] that "logic mandates" that the firm of Sprague and Rubenstone must be disqualified should separate counsel be ordered, the sole question before me is whether I may, and should, reject the defendants' voluntary, knowing and intelligent waiver of their right to separate counsel, given the conflict which is very likely to arise.

To find that a conflict is likely to arise in this case, one need not look beyond the indictment and the numerous pretrial motions, together with supporting memoranda of law, filed by defense counsel. It is immediately apparent from reading the indictment that all four defendants are not charged in each count, reflecting the fact that each defendant's involvement may vary significantly from that of

1(a). I do not rely on defense counsel's apparent concession. Whether or not defendants concede it, based upon the presumption that privileged information has been acquired as a result of the attorney-client relationship, *see United States v. Provenzano*, 620 F.2d 985 (3d Cir.), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980), logic does in fact mandate that, if separate counsel are ordered, Sprague and Rubenstone must be disqualified from representing even a single defendant.

the others. Indeed, the basis of defendants' motion to dismiss Count One of the indictment focuses almost entirely on the differences in each defendant's role in the allegedly false arrests:

> The indictment, then, charges that since arrests occurring on five days within the 17 month period (September 27, 1979; December 18, 1979; May 19, 1980; November 3, 1980; and January 6, 1981) were made without probable cause, therefore *each* of the movants necessarily conspired with each other to "arrest various citizens without probable cause" [Indictment, Count One, Paragraph 2] throughout the length and breadth of the 17 month period. In addition, only two movants, Flanagan and McNamee, participated in each of the five arrests. As is reflected in the "Indictment Breakdown", Landis was not involved in the arrest or other proceedings involving Walker and Howard, so that the indictment contains no hint that Landis could have been part of the conspiracy alleged, at least until the arrests of Woodrit and Young, on December 18, 1979.
>
> Similarly, movant Keweshan is not alleged to have acted in any capacity, or even been present at, the arrests of Ford and Tooles on May 19, 1980. Indeed, the only arrests in which each movant is alleged to have participated, are those of Woodrit and Young, Adams, and Bibbs.

Defendants' Memorandum of Law in Support of Motion to Dismiss Count One of the Indictment (Document 12, at p. 3).

And again,

> Indeed, the different identity of the alleged co-conspirators present during each "illegal" arrest, coupled with the disparate times within which the conspiracy is alleged to have existed, and the fact that, despite performing the same activity throughout the

> totality of the period ostensibly covered by the conspiracy, on no other dates with no other arrests are such acts deemed to be "illegal", suggests not only that each "illegal arrest" was the product of a separate and distinct agreement, but also that each movant, on the other dates within the period while working as a police officer, necessarily "withdrew" from any agreement to violate any law.

Id. at 13. The likelihood that one or more defendants might, at some point, wish to distinguish his or their particular role from the others is hardly remote. Furthermore, defense counsel has observed correctly that this is a complex case which will most likely turn on circumstantial evidence which is "subject to various interpretations and fine distinctions." Defendants' Memorandum of Law in Support of Defendants' Motion for Discovery and Inspection (Document 10) at p. 3. Implicit within this complexity is the fact that essential to the Government's case is proof of each defendant's state of mind. The defendants expressly recognize that oral statements made by the defendants are essential to prove the requisite state of mind of each defendant. *Id.* at 3-4. The potential for conflict here is overwhelming since joint counsel's obligation to preserve the confidences of one defendant could severely hamper the cross-examination of any hearsay witness as to another defendant. Since a defendant's "guilt or innocence may turn on exactly what was said," *id.* at 4, I cannot lightly overlook this possibility of conflict.

The most glaring evidence of the potential for conflict which may arise if all defendants are represented jointly is found in defendants Keweshan, Landis and McNamee's motion for severance, and the accompanying memorandum of law (Document 13). Although paragraphs 2-5 of the motion are set forth in the footnote,[2]

2. In pertinent part, defendants Keweshan, Landis and McNamee's motion for severance states:

briefly stated, defense counsel contends in the motion for severance that defendants Keweshan, Landis and McNamee will be severely prejudiced if forced to stand trial with defendant Flanagan because it was Flanagan's information which provided the probable cause for each

2. (Cont'd.)

(2) Defendants Keweshan, Landis and McNamee, in the performance of this duty would remain hidden while co-Defendant Robert Flanagan, posing as an aged derelict, was confronted and robbed of his money by numerous individuals. Only after the criminals had taken his money and co-Defendant Robert Flanagan gave a standard alarm, "Give me back my money," did the backup officer come on the scene.

(3) Defendants Keweshan, Landis, and McNamee aver that the present indictment, stripped to the core, discloses that all alleged violations of 18 U.S.C. §§ 241, 242 and 2 are by necessity based upon one of several arrests in which certain of them, in the performance of their duty, and only in response to their team leaders signal, acted to take a suspect into custody, reported their knowledge of this act to their superiors, and, in response to Subpoenas, gave testimony as to their participation in these arrests in various courts of law.

(4) Defendants Keweshan, Landis, and McNamee aver that (a) since their participation in each arrest underlying this Indictment was predicated on their receipt of a prearranged signal from co-Defendant Flanagan; (b) further, that from their places of hiding, they were not privileged to the details of what, in fact, occurred between co-Defendant Flanagan and the various persons who robbed him; and (c) each of the overt acts and acts included in substantive counts, related to certain of them in their individual capacity, is, standing alone, a legal act, and, in fact, was required either by circumstance or law.

(5) Defendants Keeweshan, Landis and McNamee aver that in consideration of all the foregoing reasons, the Government's case, by necessity, will be dependent on facts and circumstances of which they have little or no knowledge, but, rather, the vast majority of the Government's evidence will be related to what transpired between co-Defendant Flanagan and the various individuals who robbed him.

arrest. Specifically, counsel contends that prejudice will arise because the vast majority of the Government's evidence will be adduced against Flanagan. Hence, defense counsel argues in the memorandum of law in support of the motion for severance: "The circumstances underlying the present Indictment are such that Defendants Keweshan, Landis and McNamee strongly urge upon this Court that 'the moment' when prejudice is likely to occur if they are forced to trial along with co-Defendant Flanagan is now." Defendants' Memorandum of Law in Support of Defendants' Keweshan, Landis and McNamee's Motion for Severance (Document 13) at p. 2. Because I too am gravely concerned by the prejudice which might redound to the other defendants by virtue of their association with Flanagan and, more particularly, by joint counsel's possible inability to distance Keweshan, Landis and McNamee from Flanagan, I must address the question of whether I may order separate counsel over defendants' voluntary, knowing and intelligent waiver of their right to separate counsel.

Fed.R.Crim.P. 44(c) provides that, "[u]nless it appears that there is good cause to believe no conflict is *likely to arise*, the court shall take such measures as may be appropriate to protect each defendant's right to counsel." Fed.R.Crim.P. 44(c) (emphasis added). The phrase "such measures as may be appropriate to protect each defendant's right to counsel" is nowhere defined in the rule. Furthermore, since the rule did not become effective until December 1, 1980, there is no case law, as yet, interpreting the rule. Nevertheless, defendants argue that, based on pre-rule 44(c) precedents in this and other circuit courts of appeals, this court has no power to reject a criminal defendant's voluntary, knowing and intelligent waiver of separate counsel unless an *actual* conflict of interest is shown to exist. The Government argues to the contrary, contending that, pursuant to my obligation to supervise the conduct of members of the bar, I do have

authority to reject the defendants' waiver and order that each be represented by separate counsel.

As with so many difficult legal questions, resolution of the issue before me requires a balancing of two substantial but competing interests. First, while it is often said that a criminal defendant does not have an absolute Sixth Amendment right to particular counsel, *United States ex rel. Carey v. Rundle*, 409 F.2d 1210 (3d Cir. 1969), *cert. denied*, 397 U.S. 946, 90 S.Ct. 964, 25 L.Ed.2d 127 (1970), that statement should not be construed to mean that a defendant has no constitutional right to counsel of his choice. The Third Circuit Court of Appeals has frequently stated that, within limits, a criminal defendant is entitled to be represented by particular counsel. *E.g.*, *Davis v. Stamler*, 650 F.2d 477 (3d Cir. 1981); *United States v. Laura*, 607 F.2d 52 (3d Cir. 1979); *United States ex rel. Carey v. Rundle*, *supra*. However, against a defendant's Sixth Amendment right to counsel of his choice must be weighed this court's responsibility to supervise the professional conduct of attorneys practicing before it. *See, e.g., United States v. Miller*, 624 F.2d 1198 (3d Cir. 1980). In *Miller*, the district court disqualified the law firm representing Miller because a member of the law firm had been an assistant U. S. Attorney at the time the case against *Miller* was prepared. Even though the former government attorney had no direct involvement with the preparation of the case against Miller, the Court of Appeals upheld the district court's order disqualifying the attorney in order to avoid the appearance of impropriety which might result if former prosecutors were permitted to "assume private employment that appears to involve conflicts of interest." *Id.* at 1202-03. Similarly, in *United States v. Provenzano*, 620 F.2d 985 (3d Cir.), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980), the district court disqualified a defendant's attorney because the attorney had previously represented the government's chief witness, Ralph Picardo, on a murder conviction.

Although the defendant was willing to waive the conflict, the Court of Appeals upheld the district court's order because the attorney's duty to preserve the confidences of Picardo could interfere with the effectiveness of the attorney's cross-examination of Picardo on behalf of his client. Interestingly, the Court of Appeals accepted the district court's assumption (since no explicit findings were made) that the attorney possessed privileged information which involved him in a conflict. *See id.* at 1004-05.

Although the ethical considerations which justified disqualifying the criminal defendant's attorney in *Miller* and *Provenzano* did not stem from any multiple representation of defendants, the two decisions reflect clearly the Third Circuit Court of Appeals' heightened sensitivity toward ethical concerns and the district court's responsibility for enforcing the rules of ethics. This sensitivity is further reflected in *United States v. Quinones*, 613 F.2d 47 (3d Cir.), *cert. denied*, 446 U.S. 937, 100 S.Ct. 2155, 64 L.Ed.2d 790 (1980), which, unlike *Miller* and *Provenzano*, did involve multiple representation of defendants. In *Quinones*, the district court found that a potential for conflict of interest existed and that the defendants had not made a knowing and intelligent waiver of their right to effective representation. The district court ruled, however, that the defendants could not be represented by the same counsel, and the Court of Appeals affirmed the ruling as not clearly erroneous. On only one occasion has the Court of Appeals for the Third Circuit reversed a district court for disqualifying counsel of a criminal defendant's choice, *see United States v. Laura, supra*, and then only because the district court failed to give any reasons on the record for so doing.

Defendants argue that *Miller*, *Provenzano* and *Quinones* are all inapposite to the issue presented by the Government's motion to prohibit multiple representation. Rather, defendants maintain that the Third Circuit Court

of Appeals' decision in *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978), is controlling. In *Dolan*, two defendants, Michael Garofolo and John Dolan, were represented jointly by Samuel DeLuca. The day before the trial was scheduled to begin, DeLuca, without Garofolo's knowledge, offered to have Garofolo plead guilty if the Government would agree to dismiss the charges against Dolan. Although the Government refused, Garofolo pled guilty on the date set for trial. After questioning Dolan and Garofolo about the dangers of multiple representation, the district court judge accepted Garofolo's guilty plea. With sentencing of Garofolo postponed, the trial against Dolan then went forward. Dolan took the stand in his defense and attempted to shift the guilt to Garofolo. Subsequently, the Government informed the court that Garofolo had been subpoenaed to testify as a rebuttal witness. At this juncture, the judge questioned DeLuca as to how he could represent Garofolo, who was awaiting sentencing, and effectively cross-examine Garofolo on behalf of Dolan. Although DeLuca stated that he perceived no conflict of interest, the district court ordered DeLuca to withdraw from representing either Garofolo or Dolan. On appeal, Dolan's attorney argued that Dolan had the right to waive his right to the effective assistance of counsel and to proceed with DeLuca as his attorney in spite of the conflict of interest. The Court of Appeals found that the district court had properly exercised its supervisory authority in disqualifying DeLuca and affirmed, stating:

> Faced with an actual serious conflict of interest, rather than a mere possibility, in which it is obvious that Mr. DeLuca cannot "adequately represent the interest" of his client, Dolan, must the court accede to Dolan's waiver of conflict of interest? We think not. In the current effort to elevate the standards of the organized bar, the ABA Code of Professional Responsibility provides that "a lawyer may represent multiple clients [only] if it is obvious that he can adequately

represent the interest of each . . . ." ABA Code of Professional Responsibility (1975) DR5-105(C). Accordingly, we hold that when a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver. Under such circumstances, the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation. See Note, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 Crim.L.&C. 226, 250 (1977).

570 F.2d at 1184 (notes omitted).

Defendants read *Dolan* as holding that only where an *actual* conflict of interest is found may a district court disregard a defendant's knowing and intelligent waiver of his right to effective representation. Thus, since no actual conflict of interest has been shown to exist in this case thus far, defendants contend that their Sixth Amendment right to counsel of their own choosing must be respected. Defendants' position appears to be in accord with decisions from the Second and Fifth Circuit Courts of Appeals which indicate that a criminal defendant may knowingly and intelligently waive his right to conflict-free representation, and that the district court's supervisory authority must give way to the defendant's Sixth Amendment right to particular counsel. *See United States v.*

Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975).

Unlike defendants, I do not read *Dolan* as holding that *potential* conflict is *never* sufficient to override a defendant's knowing and intelligent waiver of his right to effective representation. Indeed, that issue was not before the court. In *Dolan*, the conflict manifested itself *after* the trial had commenced. Here, I must determine whether a district court may take the initiative and exercise its discretion to avoid the serious potential for conflict before jeopardy attaches. Since I conclude that I may, and, more importantly, because of my grave concern that a conflict is very likely to arise in this case, I will grant the Government's motion and disqualify the firm of Sprague and Rubenstone from representing any of the defendants in this case.

In reaching my determination, I am influenced by several factors. First, Rule 44(c), which became effective more than two years after *Dolan* was decided, looks prospectively. Obviously, in advance of trial, the district court judge has very little opportunity to discern whether an actual conflict of interest exists as a result of multiple representation. To overcome this difficulty, some courts have resorted to what to me appears to be the fiction of finding that the attempted waiver is not knowingly and intelligently made. I simply refuse to adopt that approach where, after a thorough examination of defendants, four career police officers continue to desire to be represented by single counsel. Second, the concerns underlying the *Dolan* decision appear to be as pressing in this case. In *Dolan*, the Court of Appeals expressed concern not only over the breach of professional ethics arising from the joint representation, but also over the interest of the trial judge in being "free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court." 570 F.2d at 1184.

Although not easily applied, defense counsel's ethical responsibility to the defendants in this case is contained

in *ABA Standards Relating to the Defense Function* § 3.5 (Approved Draft 1971) which, in relevant part, provides:

> The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is *clear that no conflict is likely to develop* and when the several defendants give an informed consent to such multiple representation. (Emphasis supplied)

See also ABA Code of Professional Responsibility DR5-105. Based upon defense counsel's submissions to the court, I have no doubt that this is not a case where "no conflict is likely to develop." Indeed, I am not sure whether defense counsel is even in a position to discuss the possibilities of conflict with the defendants:

> A summary reading of the Indictment will convince the Court that not only are the Defendants unable to determine what particulars the Government intends to prove against them as a group, but perhaps more importantly, the Defendants as individuals are unable to make a reasoned determination whether there is a defense available to one individual which might prove adverse to the others. Absent the ability to make such a determination, the Defendants, if forced to trial absent a Bill of Particulars, will be denied their right to a fair trial guaranteed by the Sixth Amendment of the United States Constitution, and the effective assistance of council (*sic*) guaranteed by the Fifth Amendment of the United States Constitution.

Defendants' Memorandum of Law in Support for Bill of Particulars (Document No. 7) at p. 4.

Finally, merely because I find the defendants' waiver of their right to effective representation to be knowing and intelligent today in no way guarantees the continuing

validity of that waiver throughout the remainder of the proceedings against them. Under such circumstances, must I sit back and wait for a potential conflict to become an actuality? If my finding that there is a potential for conflict were based upon mere speculation, I too would agree that the court should not interfere with a defendant's choice of counsel. But, where the likelihood is great that a potential conflict may escalate into an actual conflict, and thus threaten to render the entire trial process null and void, I believe it is well within a court's discretion to anticipate the conflict and disqualify defense counsel.

In support of their argument that an actual conflict of interest is necessary before a valid waiver can be rejected, defendants cite the Supreme Court's recent decision in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), which held that to establish a violation of his Sixth Amendment right to the effective assistance of counsel, a criminal defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348. *Cuyler* dealt with issues substantially different from those presented in this case. *Cuyler* went to the Supreme Court on *certiorari* from a ruling of the Court of Appeals for the Third Circuit directing the district court to grant a state prisoner's petition for a writ of habeas corpus. Applying the standard enunciated in *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 210 (3d Cir. 1973), the Court of Appeals had held that Sullivan had been deprived of his Sixth Amendment right to the effective assistance of counsel because a possible conflict resulted from the joint representation of Sullivan and a co-defendant during their separate trials in state court. The Supreme Court reversed, holding that possible conflict was insufficient to constitute a violation of Sullivan's constitutional rights.

I am not persuaded that *Cuyler* requires a showing of an actual conflict of interest before defense counsel may be disqualified over defendants' knowing and intelligent waiver. In *Cuyler*, the trial (in the state court) had taken

place. It was an accomplished fact. What happened at the trial with joint counsel was history. To require a showing of actual conflict of interest to establish a violation of a defendant's constitutional rights in a completed trial provides no authority compelling a court to wait until an actual conflict arises before it may act to forestall a violation of those same rights. *Cuyler* did not involve disqualification of counsel on ethical grounds. *Cuyler* did not involve application of F.R.Crim.P. 44(c). As noted earlier in this opinion, Rule 44(c) is prospective in its thrust. Clearly the intent of the rule would be frustrated if a court were forced to await a constitutional violation before it could act to prevent it. Thus, while I recognize that the defendants have a right to counsel of their choice, that right is not unlimited and must yield to the court's overriding interest in protecting their rights to adequate representation and fair trial, and in preserving the integrity of its procedures.

Accordingly, for the reasons expressed in this opinion, I will grant the Government's motion to prohibit multiple representation and disqualify the firm of Sprague and Rubenstone from representing any of the four defendants.[3]

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3. My decision to disqualify defense counsel is based upon the conflict of interest which I find is likely to result from the multiple representation of the four defendants. The Government, in its Supplemental Memorandum in Support of Its Motion for Disqualification, has attempted to interject a new conflict. Specifically, the Government states that Sprague and Rubenstone also represented Officer James Kennedy during the grand jury investigation of the defendants and that Kennedy is a possible government or defense witness in the pending case. If this were the only ground for disqualification I would not be inclined to give it much weight, for to do so would permit the Government to create a potential conflict where none might otherwise have been likely to arise. Under the circumstances, however, where I have been persuaded that other grounds for disqualification are sufficient this added fact demonstrates the danger inherent in an attorney's attempt to represent multiple persons charged with unlawful activity.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 2, 1981

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-270

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN
JAMES KEWESHAN
SIDNEY LANDIS
THOMAS McNAMEE

Order

This 2nd day of December, 1981, it is

ORDERED that the Government's Motion to Prohibit Multiple Representation of Defendants is GRANTED and the firm of Sprague and Rubenstone is disqualified from representing any of the defendants in the above captioned action. It is

FURTHER ORDERED that each defendant shall within twenty (20) days cause substitute counsel of his choice to enter an appearance on his behalf, failing which the Court shall appoint counsel for each from attorneys registered under this Court's plan for appointment of attorneys under the Criminal Justice Act.

The Court having been advised of defendants' intention to file an immediate appeal from this Order, it is

FURTHER ORDERED that a Stay is GRANTED pending disposition of the appeal.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 4, 1981

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-270

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN
JAMES KEWESHAN
SIDNEY LANDIS
THOMAS McNAMEE

Order

This 4nd day of December, 1981, upon consideration of defendants' Motion for Reconsideration and/or Clarification of this Court's Opinion and Order filed December 2, 1981, it is

ORDERED that Defendants' Motion for Clarification is GRANTED, and the Opinion heretofore filed is clarified by inserting, as footnote 1(a) following the word "concedes" on the second line of the first full paragraph on page 5, as follows:

"1(a). I do not rely on defense counsel's apparent concession. Whether or not defendants concede it, based upon the presumption that privileged information has

been acquired as a result of the attorney-client relationship, *see United States v. Provenzano*, 620 F.2d 985 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980), logic does in fact mandate that, if separate counsel are ordered, Sprague and Rubenstone must be disqualified from representing even a single defendant."

/s/ ALFRED L. LUONGO

J.

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED JUNE 2, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3116

UNITED STATES OF AMERICA

v.

FLANAGAN, ROBERT
KEWESHAN, JAMES
LANDIS, SIDNEY
McNAMEE, THOMAS,

Appellants

(D.C. Crim. No. 81-00270-01/04)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS and HUNTER *Circuit Judges* and THOMPSON, *District Judge**

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel May 11, 1982.

* Honorable Anne E. Thompson, United States District Judge for the District of New Jersey, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 4, 1981 be, and the same is hereby affirmed.

ATTEST:

/s/ SALLY MRVOS
Sally Mrvos
Clerk

June 2, 1982

Certified as a true copy and issued in lieu of a formal mandate on July 20, 1982.

Test: /s/ FRANCIS R. MUTYSIK

Deputy Clerk, United States Court of Appeals for the Third Circuit.

ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED JULY 12, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3116

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS and THOMAS McNAMEE,
Appellants

(D. C. Criminal No. 81-00270-01/04)

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and THOMPSON *, *District Judge*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

* Hon. Anne E. Thompson, United States District Judge for the District of New Jersey, sitting by designation on panel rehearing only.

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ JOHN J. GIBBONS

Judge

Dated: JUL 12 1982

TRANSCRIPT OF RULE 44(c) PROCEEDINGS HELD BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ON NOVEMBER 12, 1981

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[1]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-270

U. S. A.

v.

ROBERT FLANAGAN
JAMES KEWESHAN
SIDNEY LANDIS
THOMAS McNAMEE

Philadelphia, Pa., November 12, 1981

Before HON. ALFRED L. LUONGO, *J.*

GOVERNMENT'S MOTION FOR HEARING AND TO PROHIBIT MULTIPLE REPRESENTATION

APPEARANCES:

LUTHER E. WEAVER, III, ESQ.
PETER F. SCHENCK, ESQ.
Attorneys for Government

BRUCE L. THALL, ESQ.
JIM LEONARD, ESQ.
Attorneys for Defendants

[2]

(Court convened at 11:00 a.m.)

The Court: Good morning.

Mr. Thall is not here.

Mr. Weaver: We have not seen him, Your Honor. The Government has not.

The Court: We will wait a few minutes.

Miss Richards, would you call Mr. Sprague's office to find out if anyone has left?

(Pause)

Mr. Thall: Good morning, Your Honor, I apologize for being late. We got a little tied-up in traffic.

The Court: All right.

All right. I have scheduled this morning only the Government's motion for hearing and to prohibit multiple representation. And, the reason I have scheduled only that motion would appear rather obvious, that if the Court should determine that multiple representation is improper, Mr. Thall would certainly not be in a position to argue the other motions.

We will hear the Government's presentation.

Mr. Weaver: Your Honor, the Government wants to state emphatically that at this time we are not

[3]

100 percent convinced that a conflict does exist. We filed the motion as according to Rule 44 of the Federal Rules of Criminal Procedure. A hearing must be held to determine whether or not a conflict exists where multiple defendants are represented by single counsel.

We would like to place certain things on the record, however, in the matter.

As in any conspiracy case, the evidence as to each of the four defendants charged in this case is not equal.

The defendants have filed a motion for severance, and the way the Government read the motion, the motion was filed by three of the defendants; that is defendants Landis, Keweshan and McNamee, alleging in part that there may be a prejudice if in fact they go on trial with Officer Flanagan.

We feel that the Government did counter that motion, arguing that severance was not required in this case, but we raise a question as to whether or not the filing of that motion is in and of itself evidence of a conflict, and also if it is alleged by the defendants themselves that there would be prejudice to be tried along with Agent Flanagan—with Officer Flanagan—whether or not the representation by the same counsel for all defendants at a joint trial would also result in a conflict of interest.

[4]

In addition, in that motion, the three defendants that I mentioned, state that they played a different role while they were on the street acting as police officers from Officer Flanagan; that is, that Officer Flanagan was the decoy officer. He would be the one who would put himself in a position to be robbed by a suspect, and that they would back him up coming onto the scene once the signal was yelled.

The Government will state that that is correct to a certain extent. We agree with that statement to this extent, and that is that the three defendants who filed that motion did have a different role in the decoy scenario as opposed to Officer Flanagan, and, we suspect to a certain extent the evidence will reflect that.

Therefore, those are the basic reasons why we filed the motion to explore whether or not there would be any prejudice on the part of any defendant in being represented by the same counsel.

The Court: Mr. Thall.

Mr. Thall: Your Honor, there are several things I would like to bring to Your Honor's attention.

First of all, I would like to add that in addition to the cases which we cited in our brief, I would also like to call the Court's attention to the case of Cuyler vs. Sullivan, which was decided by the Supreme Court

[5]

of the United States on May 12 of 1980, and is found at 100 Supreme Court Reporter, page 1708.

The Court: I have it.

Mr. Thall: O.K. All I want to refer to in that case specifically is, the language on page 1719 reflecting that, at least in the view of the Supreme Court, in order for there to be an actual conflict—excuse me.

> "In order to demonstrate a violation of Sixth Amendment rights, defendant must establish that an actual conflict of interest adversely affected his lawyer's performance."

This case, I think when read in connection with Rule 44C, suggests very strongly that even in the pre-Rule 44C context in which the Dolan case arose, which is cited in our memorandum, there has to be an actual conflict of interest as opposed to a potential conflict of interest in order for the Court to consider whether a conflict, potential, actual, exists, and if so whether the Court has the power to require that separate counsel be appointed. That is on the law.

In terms of the background of this case, Your Honor, what I propose to do is as follows:

I would first like to make some general statements respecting the representation here in the matters at issue; I would then like to provide to Your Honor in open

[6]

court the types of inquiries which were pursued with each of the individual defendants in order to make sure that they understood, as Your Honor ultimately has to conclude, whether or not potential conflicts which do lurk might cause them to want to have other counsel; and, awareness of those, nonetheless, suggesting to them that they want to stay with counsel that they have retained, the law firm of Sprague and Rubinstone.

Then I would propose that we put each of the four individuals, defendants, on the stand, so that Your Honor and Mr. Weaver, or us if Your Honor would so direct, can demonstrate to Your Honor's satisfaction that indeed the possible pitfalls which do face defendants in situations where there is multiple representation, have been made known to them, and that in fact they waive any question concerning those possible pitfalls knowingly, intelligently and voluntarily.

The Court: The real question, Mr. Thall, will arise when and if the Court is convinced that there is a serious potential for conflict of interest.

Mr. Thall: I do propose to address that, Your Honor.

The Court: I am virtually convinced of that now. And, the question that we really have to consider is whether the defendants can effectively, under

[7]

any circumstances here, waive their rights concerning that conflict and proceed with single counsel. And it appears to me that the only way to resolve that will be for an immediate appeal to be taken in the event the Court should determine to require the defendants to have separate counsel.

The potential for conflict just jumps out in this case and I just don't know how counsel could even undertake, under the circumstances, to attempt to represent all four of these defendants.

Mr. Thall: Perhaps I can address that, Your Honor.

The Court: Yes.

Mr. Thall: Let me state emphatically that from the first date these individual defendants did come into our office, both Mr. Sprague and I have, on several occasions, discussed with them the facts surrounding the matters at issue.

The Court: I assume you did, Mr. Thall.

Mr. Thall: And, I can also state categorically to Your Honor that having discussed with them individually and together, their knowledge of the facts surrounding the issue, and discussing with them different alternative tactics and defense strategies which could be employed in the context of this case—and, Your Honor, I am making these representations to you with the approval of my clients

[8]

for the limited purposes of these proceedings, even though they are attorney-client communications——

The fact is, Your Honor, there is no actual conflict, and our office, I think, has a reputation for being——

The Court: Mr. Thall, I really don't want to hear what counsel's assessment of the situation is.

I want to explore with each of the defendants, which I will do myself, whether they understand the potentialities here.

I am sure that you have explained it to them, and I will inquire of them as to that. I am sure they will give me all the right answers in that regard.

Mr. Thall: If I may, Your Honor, might I proceed to disclose to the Court the specific areas of potential conflict which have been discussed with each of the individual defendants? I think that might be of assistance to the Court in determining the focus of its own inquiries.

First of all, Your Honor, it has been discussed with each of the defendants the fact that each is entitled in both opening and closing statements made by counsel on their behalf, to set each one apart from the other defendant to say that it wasn't me who did it, it was the other guy; that that is a right that they have,

[9]

assuming that the facts as they understand them are in fact consistent with that approach; and that by having one counsel, or by having representation from one office, even if there are individual lawyers representing each defendant, there is a potential for conflict in that such argument would not likely be made either in opening or in closing.

It was also discussed with each defendant that in the event that the matter actually did go to trial, and in the event that one were convicted of any or all of the offenses contained in the indictment, that at sentencing there could be a potential conflict given joint representation by one office of several defendants.

The Court might view it more difficult for one office to argue that the major guilt here is ascribable to defendant A as opposed to defendant C, when in fact all lawyers—all defendants are being represented by one counsel.

In addition, each was advised that in most of the counts of the indictment all four are jointly charged, and that the fact of joint representation on one office might cause a jury to infer that if one were guilty all would be guilty; that the fact of joint representation in and of itself might be a factor that a jury—impermissibly but nonetheless might consider in determining the questions

[10]

of guilt; each was advised, Your Honor, that under certain circumstances the Government might tender either immunity to one defendant to convince him to, or compel him to testify against another, or that the Government might offer a plea of guilty with a recommendation of no sen-

tence, or even offer to dismiss charges; and that under such circumstances an individual defendant, were that to happen, might be compelled, or advised, to testify as to information within his knowledge which could redound to the other's detriment; and that counsel would not have been aware necessarily of such knowledge were it not for the fact of joint representation.

In this regard, Your Honor, I would also like to state that defendants have stated that even were separate counsel appointed for each, they would want joint trial strategies and would make themselves available to counsel so that each counsel would be apprised to the fullest extent possible of all factual knowledge in the possession of each.

The Court: That is a totally separate problem.

You see, the trial strategy that may be finally adopted with one counsel is far different from the decision that is made when each is represented by separate

[11]

counsel. They might come to the same decision as to the strategy to employ, but with one counsel that strategy may be suspect and may lead to a conflict of interest result, whereas with four counsel representing each individual defendant, it is a much less likely charge and possibility.

Mr. Thall: And, Your Honor, I am not making a representation that if there were four separate counsel the trial strategy adopted would be the same. All I have stated was that the defendants wish there be a joint trial strategy.

The Court: That is a matter that can be accomplished with separate counsel, and we all know that, Mr. Thall.

Mr. Thall: I am not saying it can't be, Your Honor.

The point is that the information elicited from each defendant, factual information, would be made available

to all other counsel just as though they were one counsel or one firm providing representation.

Each individual was advised, Your Honor, that it is likely, given the nature of the charges as we understand them, that there will be a greater quantum of evidence adduced against Defendant Flanagan as opposed to the other three, that it is possible that such evidence

[12]

might appear more serious in the eyes of jurors than the evidence adduced against the other three; and that by dint of joint representation it is possible that the jury could infer the commission of a more serious act against one of the other three merely because of such joint representation.

Each has been advised that given the fact that it is likely more evidence will be adduced against one as opposed to the others, counsel might spend more time concentrating its defense efforts toward that one as opposed to the others, which in itself somehow might cause the possibility for a conflict to exist.

Each has been advised that he possesses the right to testify on his own behalf; that if he chooses not to testify no adverse inferences can be drawn by the jury, but that if that one defendant chooses to testify and others do not, the mere fact of joint representation may cause a jury—improperly, but nonetheless may cause a jury to infer guilt on the part of the person not testifying in ways that might not occur where there is separate counsel.

I might add that each has been advised of his right to counsel, and of the fact that were he not to have sufficient funds to pay for an attorney, the Court would appoint counsel.

Each defendant has also been advised that

[13]

should he choose to testify, he may, on cross-examination

from the Government, be asked questions respecting his knowledge of activities of other defendants.

Each has been advised that should counsel choose to present character or reputation testimony on behalf of some, but not all four defendants, by mere fact of joint representation alone a jury might infer a negative character or reputation on the part of such individual.

These are the nature of the specific subjects gone over with each of the individual defendants.

I again state, Your Honor, that we do not see an actual conflict at this time.

The Court: My inquiry, Mr. Thall, quite apart from your argument, will be addressed to whether a conflict is likely to arise, in the words of Rule 44C.

Mr. Thall: I understand, Your Honor.

The Court: So that it is quite apparent that there is no actual conflict today. I am looking down the road.

Mr. Thall: I understand, Your Honor.

Now, if Your Honor wishes, we could proceed by calling defendants to the stand, or however Your Honor—

The Court: I will proceed in my own fashion with an individual inquiry, and then each side may do as

[14]

it pleases.

I will make an inquiry of each of the defendants, and even if they answer the questions a certain way I will have concerns.

Mr. Thall: I understand, Your Honor.

The Court: Robert Flanagan.

You may stand right here.

Would you swear each of them in turn for this purpose?

(Robert Flanagan, sworn.)

The Court: State your name, please?

The Witness: Robert Flanagan, F-l-a-n-a-g-a-n.

The Court: Let it also be understood that if it becomes necessary in the course of this inquiry to clear the courtroom, including Government counsel, in order not to prejudice any of the defendants in future conduct of the case or the trial, I will do so.

Mr. Thall: I appreciate that, Your Honor.

The Court: And, if at any point it appears to anyone, Mr. Thall or any of the individual defendants, that we are encroaching in critical areas, you need only sound an alarm and I will clear the courtroom for this purpose.

EXAMINATION BY THE COURT

Q. Mr. Flanagan, there are serious charges levelled against

[15]

you and your three co-defendants in this case, and you are aware of that?

A. Yes, sir.

Q. You are aware also, I assume, that each of you is entitled to be represented by counsel of his own choice.

A. Yes, sir.

Q. Now, Mr. Thall has already represented to the Court that extensive discussions have taken place in which it has been pointed out that there are many potential areas of conflict in the course of the criminal proceedings in having more than one defendant represented by one attorney; is that so?

A. Yes, sir.

Q. Now, do you fully appreciate that at some point in the trial it may occur to one of the defendants that he ought to cop a plea, that he ought to make a deal, that he ought to get out and do the best he can for himself?

A. Are you asking me if that is a possibility?

Q. I am asking you whether you are aware that in the course of the trial that that could happen?

A. I don't know how to respond to that question, Your Honor. You mean personally involving this particular matter itself?

Q. In this matter, yes.

A. I would only have to assume and I wouldn't want to

[16]

make that judgment.

Q. You would have to assume what, that it won't happen, or it could happen?

A. That it won't happen.

Q. All right. So that your judgment in proceeding with one attorney is based on your present expectation that none of your co-defendants will turn tail and run.

A. That's correct.

Q. All right.

You are aware, though, that it is a possibility, human nature being what it is, that one of the four may turn out to be not quite as resolute and insistent as he is now that we will stand together.

A. Not with my knowledge of the cases in question, Your Honor. My answer to that would be no.

Q. You just don't believe that that could possibly happen ?

A. No, sir.

Q. Now, in the event that you are wrong and one of the other defendants should decide to turn tail, do you realize that if that defendant were to take the stand, if you were represented by separate counsel your attorney would have the right to cross-examine that person. If you are represented, all of you, by the same attorney, you could not expect the one attorney who had represented this person to cross-examine him, could you?

[17]

A. No, sir.

Q. So that you would run the risk by single representation that if you are wrong in your assessment of all the defendants being willing to stand together throughout, you would be giving up a chance for cross-examination of one of your co-defendants if he should take the stand?

A. Under those conditions, yes, sir.

Q. Now, Mr. Thall has said that one of the things he discussed with all defendants is that normally each defendant represented by separate counsel would have his own opening statement to the jury in which he would paint his own client as the saint, if you will, and if necessary paint the others as not so saintly if each was represented by a different attorney; and by the same token, in the closing arguments to the jury the same thing would happen: Each attorney would attempt to minimize his own client's involvement and maximize, if the evidence pointed to guilt on somebody's part, the involvement of the other defendants; do you realize that that is what would happen if the case proceeded with each with separate counsel?

A. Yes, sir.

Q. And, that if there is one attorney, then all of that opportunity goes out the window, because one attorney representing four people can't paint one out to be a saint and another not so saintly.

[18]

A. Yes, sir.

Q. And you would be willing nevertheless to proceed with the one attorney?

A. Yes, sir.

Q. It has also been explained to you that it is possible that if the case goes to trial, that one or more of the defendants may decide to put on character evidence, or good reputation evidence.

A. Yes, sir.

Q. And that if not all put it on, then this could look—cause the jury to get a bad impression of the one that didn't put on good reputation evidence.

A. Yes, sir.

Q. So, it puts you all in the same position even though your backgrounds may be different.

A. That's correct.

Q. First of all, let me ask whether financial considerations are involved in your decision to be represented by one attorney?

A. No, sir.

Q. That if you were required to have separate counsel, this would present no problem to you?

A. Not to my present knowledge, Your Honor.

Q. So that if the Court were to order that there be separate counsel for each of you, this would not present

[19]

a financial burden.

The reason I ask that question is, if it does, I want you to understand clearly that if it does present a financial problem, the Court would appoint counsel to represent each individual defendant.

A. I could only assume it wouldn't. However, it would depend on the decision made by our Union, the Fraternal Order of Police.

Q. All right. So that there is someone who is furnishing financial support for your representation?

A. That's correct.

Q. All right. I want you to understand in your final decision here, that if financial considerations are the problem, the Court will appoint counsel if it is necessary to appoint separate counsel.

A. I understand, Your Honor.

Q. I earlier mentioned that if one of the defendants should decide to take the stand, that he would be—that the other defendants would be entitled to cross-examine that defendant; so would the Government be entitled to cross-examine that defendant, and, the Government would be entitled to cross-examine that defendant concerning all of the defendants, not just the one who took the stand.

Are you aware of that?

A. Yes, sir.

[20]

Q. Now, Mr. Flanagan, in light of—of course there is also the problem of sentencing.

If all of you should be convicted—and I want to put it in these terms first: If all defendants should be convicted, normally attorneys who represent defendants who have been convicted make an effort, the last effort when it comes to sentencing, to get some kind of a break from the sentencing judge, pointing out that even if my client has been found guilty by the jury, he was such a small part of this, he was practically innocent even though the jury found him guilty; it was really the other fellows who were bad people. Sentence them and let my fellow walk out on the street; do you understand that?

A. Yes, sir.

Q. If you are all represented by one attorney, it would be improper for him to make any such argument, do you understand that?

A. Yes, sir.

Q. Now, with all of those considerations, is it your decision that you want to waive your right to be represented by separate counsel?

A. Yes, sir.

Q. All right. Thank you. You may return to your seat.

A. You are welcome.

The Court: Does anyone else have any ques-

[21]

tions before he returns?

Mr. Thall: I have none, Your Honor.

Mr. Schenck: Just one, Your Honor.

By Mr. Schenck:

Q. Mr. Flanagan, you understand that even if it were decided to present what would be consistent or a united defense among the four of you, that if you were represented by separate counsel, that counsel could present the one united defense and also present to the jury alternative defenses, such as, "My client was not present at this particular scene," and would not necessarily have to give up a united defense; do you understand that?

A. That's correct.

Q. Thank you.

(Witness excused.)

The Court: James Keweshan.

(James Keweshan, sworn.)

The Court Reporter: For the record, would you state your full name, please?

A. James Keweshan, K-e-w-e-s-h-a-n.

By The Court:

Q. Keweshan is the correct way to pronounce that?

A. Yes.

Q. Officer Keweshan, you have heard me address a number

[22]

of questions to Mr. Flanagan. I don't have the kind of memory that will enable me to pose all of the same questions to you, but I am going to try to go through generally the same procedure.

There are four of you here who are charged with a crime, a very serious crime.

A. Yes, sir.

Q. You understand, do you not, each of you is entitled to be represented by a separate attorney.

A. Yes, sir.

Q. Do you understand that?

A. Yes, sir.

Q. And that if you are represented by a separate attorney, that attorney would be obligated to represent just you alone, and to do that which is in your best interest as opposed to what may be in the joint best interest of the four of you; do you understand that?

A. Yes, sir.

Q. Do you understand that in the course of the trial it is possible that one of the four, or more than one of the four, may have a change of heart and decide to make some kind of a deal for himself, do you understand that?

A. Yes, sir, I understand that.

Q. And that if that should happen it would create conflicts on the part of the attorney who is attempting to

[23]

represent all four; do you understand that?

A. Yes, sir.

Q. So, for example, if the Government were to offer to you some sort of immunity for testifying against your colleagues, and if you were to consult with counsel, could you be sure that counsel would have—joint counsel—would have your best interest at heart in advising you whether you should go along with that deal, or would he be more concerned with the best interests of the four of you?

A. I understand that, sir. I understand the possibility there.

Q. But, do you believe that counsel could, under those circumstances, advise you as to your best interest?

A. Yes, sir.

Q. If he did, would he not be advising you in a manner that might be against the best interests of the other four?

A. I don't believe so.

Q. And is that belief on your part predicated on the belief that throughout you will retain and continue to present a united front?

A. Yes, sir.

Q. And, therefore, you have ignored the hypothetical that I have posed to you that at least one of you would change his mind, including you.

[24]

A. That's right.

Q. You are saying in effect that there is no chance you will change your mind.

A. That's correct.

Q. Are you as sure about your fellow defendants?

A. I believe so, yes, sir.

Q. Do you recognize it as a part of human nature that people do occasionally change their minds?

A. I understand that.

Q. And that they do occasionally develop a belated concern for their own best interest rather than joint best interest with others?

A. I understand that, sir.

Q. Now, do you understand that if that should happen, and one of the other defendants were to make a deal with the Government and become a witness, that your attorney would not be able to cross-examine that defendant if he should testify against you?

A. I understand that, sir.

Q. Because of the prior attorney relationship he would simply not be permitted to, do you understand that?

A. Yes, sir.

Q. And, if that one defendant were to take the stand, you know that the Government would be entitled to cross-examine as to the activities of all of the defendants,

[25]

and your attorney would not really be in a position to counter that cross-examination as a separate attorney might be?

A. I understand that.

Q. Now, I have asked Mr. Flanagan and I will ask you:

Do the financial considerations here enter into your decision to be represented by one attorney?

A. No, sir.

Q. And that is for the same reason, that you are receiving some financial support from your Union for this representation?

A. That's right.

Q. So that if the Court were to decide that the potential for conflict is so great that I must appoint separate counsel, or that I would require separate counsel, you would furnish your own separate counsel at your own expense, or at the expense of the Union?

A. I would have to go to the Union, yes.

Q. But, I want you to understand that if the Union does not give you that financial support, if the Court decides that separate counsel must be appointed in the case, the Court would undertake to do so without expense to you?

A. I understand that, sir.

Q. Do you understand also that in the course of the trial as bearing on guilt or innocence, one or more, and less

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than all of the defendants might decide to put on character or reputation testimony.

A. I understand that.

Q. And, if that happens it reflects badly on the defendant or defendants who don't put it on, and your attorney would have to probably consider the effect overall on all four defendants before deciding to put on reputation or character evidence on behalf of less than all; do your understand?

A. I understand that, yes, sir.

Q. And that this is another area of potential conflict on the part of counsel?

A. I understand that, sir.

Q. It has been suggested that the defendants have agreed upon a trial strategy which would, in effect, present a united front; a unified kind of defense.

Are you aware that that same strategy could be adopted even if there were four separate attorneys?

A. Yes, sir.

Q. And, are you aware that if that separate strategy were adopted with four separate attorneys in the case, you would at least have the assurance that your attorney representing you alone had made that decision in your best interest as opposed to the best interest of the four of you?

A. I understand that.

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Q. Now, notwithstanding all of these things that I have questioned you about, is it your desire to waive this potential conflict which appears quite apparent in this case, and to be represented by one attorney?

A. Yes, sir.

Q. All right.

The Court: Any other questions?

Mr. Schenck: The same one, Your Honor.

By Mr. Schenck:

Q. You understand that separate counsel, while presenting the unified defense could present other defenses for you, or alternative defenses for you, regarding your own involvement or culpability; do you understand that?

A. I understand that.

Q. And you understand that that type of alternative defense, or alternative presentation to the jury, would be extremely difficult if not impossible for a single counsel representing all four of you?

A. I understand that.

The Court: Thank you, Mr. Keweshan.

(Witness excused.)

The Court: Sidney Landis.

(Sidney Landis, sworn.)

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The Court Reporter: State your full name, please.

The Witness: Sidney J. Landis, L-a-n-d-i-s.

By The Court:

Q. Mr. Landis, you are charged here with a very serious crime along with three co-defendants. You understand, do you not, that you are entitled to be represented by separate counsel?

A. Yes, sir.

Q. Now, when a defendant in a criminal case has his own separate attorney, he has the assurance that his attorney is making decisions and presenting a case in his client's own best interest; not necessarily in the best interest of other defendants, do you understand that?

A. Yes, sir.

Q. And that if four defendants are represented by one attorney, that that attorney necessarily will be making decisions in the best—joint best interest of four defendants; not necessarily in the best interest of one.

Do you understand that?

A. Yes, sir.

Q. And, you might be the one who is sacrificed in the common good; do you understand that?

A. Yes, sir.

Q. If you were represented by separate counsel, you

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understand that counsel would have the opportunity in opening statements and closing arguments to the jury to try to convince the jury that you had very little to do with whatever criminal activity the Government might have

shown, and that if there was criminal activity it was the other defendants, not you; do you understand that?

A. Yes, sir.

Q. But, when you are represented by one attorney, he can't do that if he is going to have fidelity to all four defendants, if he is going to do his job properly for all defendants; do you understand that?

A. Yes, sir.

Q. Do you understand also that although you all four appear to have agreed here and now to sink or swim together, that one of you may have a change of mind?

A. Do I believe it could happen?

Q. You understand that it might happen?

A. Yes, sir, I understand that.

Q. Human nature being what it is, people sometimes do change their mind; you know that, don't you?

A. Yes.

Q. Now, if that should happen and a deal were to be offered to one of the defendants with the representation by one attorney; if for example the deal were to be offered to you, for example: The Government were to say to you,

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"Mr. Landis, we will offer complete immunity to you if you will testify against these other three men." And if you were to consult with your attorney who happens to be the attorney also for the other three defendants, do you believe that he would be able to advise you in your own best interest under those circumstances?

A. Yes, sir.

Q. Even though you recognize that that would run counter to the common defense that has already been agreed upon?

A. Yes, sir.

Q. And, you think that he would be able to advise you whether you should accept the deal?

A. Yes, sir.

Q. Well, doesn't it follow necessarily from what has happened thus far, that he would have to say to you that you can't accept that deal because we are all in this together—or, you all are in this together?

A. Yes, sir.

Q. You recognize that as the possibility, don't you?

A. Yes, sir.

Q. So that if the Government were to offer you a deal, you would not have the benefit of the advice of counsel at that time, counsel representing you and your interest.

A. I understand that, sir.

Q. All right.

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Q. It is also possible in the course of the trial that the evidence would appear to be heavier against one defendant than other defendants, with the result that the attorney who is representing all four of you may be concentrating on trying to cut down the evidence against that one defendant, and in doing so he may tend to overlook the defense of the other defendants; do you recognize that possibility?

A. Yes, sir.

Q. Do you recognize also that if one or more of the defendants takes the stand, that the other co-defendants wouldn't have a real chance to cross-examine that defendant who now becomes a witness because the attorney had previously been his attorney and he wouldn't be permitted to cross-examine him because of the prior attorney-client relationship; do you understand that?

A. Yes, sir.

Q. So that if that should happen in the course of the trial, and if one of the other defendants takes the stand and puts the finger on you, your attorney would be helpless to cross-examine him; do you understand that?

A. Yes, sir.

Q. And, of course, if any defendant takes the stand, the Government has a right to cross-examine that defend-

ant as to the activities of all defendants, and again, the attorney wouldn't be able to counter that very well because of his

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prior attorney-client relationship with that witness; do you understand that?

A. Yes, sir.

Q. I take it that your answer with respect to the financial considerations is the same as Mr. Flanagan and Mr. Keweshan, that as far as you are aware the Union will put up the money for counsel, so that is not a serious consideration, is that correct?

A. That's right, sir.

Q. Now, I want you to understand that if that shouldn't happen to be so and if the Union balks for having to pay for separate counsel, counsel would be appointed for you at no expense to you; do you understand that?

A. Yes, sir.

Q. It is also possible that some, but not all of the defendants, might wish to put on reputation or character testimony, and if less than all the defendants do that it may reflect adversely on the ones who don't put on character or reputation evidence; do you understand what I am saying?

A. Yes, sir.

Q. And that this might cause counsel who represents all four to make a decision not to put on any character evidence on behalf of any: do you understand that?

A. Yes, sir.

Q. All right. Now, in light of all of the questions that

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I have posed to you, is it your desire to waive this conflict of interest which is so apparent to me in this case, and to proceed with being represented by one attorney?

A. Yes, sir, it is.

Q. Are you aware that if you were represented by an attorney whose interests—who would be representing your interest alone, that he along with the other attorneys in the case could still come to the decision, in so far as trial strategy is concerned, to present a unified joint defense; they could still come to that same decision, do you understand that?

A. Yes, sir.

Q. And that if you were represented by separate counsel, that even if he came up with a decision to present a unified defense where all of you go down the same path together, your own attorney could still present other types of defense that would be applicable to you alone and not to the others; do you understand that?

A. Yes, sir.

Q. And if you are represented by one attorney you give up that chance?

A. Yes, sir, I understand.

Q. All right. Thank you.

The Court: Any other questions?

Mr. Thall: Just one clarification, Your

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Honor.

The Court: Yes.

By Mr. Thall:

Q. Mr. Landis, if the Government were to right here and now offer you total immunity for all the charges in return for your testimony against the other defendants here, do you believe that you could discuss that offer with the law firm representing you and that it would, in your best interests, give you its best advice as to what you want to do?

A. Yes.

Mr. Thall: No further questions.

The Court: I am afraid, Mr. Thall, that that represents a conflict in and of itself.

You may step back, Mr. Landis.

Quite clearly, if such an offer were made he would have to consult separate counsel, in my view.

Mr. McNamee.

(Thomas McNamee, sworn.)

The Court Reporter: State your full name, please?

The Witness: Thomas McNamee, M-c-N-a-m-e-e.

By The Court:

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Q. Mr. McNamee, it may seem rather silly for me to go through these same questions with each and every one of you, but the law makes it clear that I must address these questions to each one of you individually. I can't assume that you have listened to the other questions and answers.

You have been charged here with very serious criminal charges; do you understand that?

A. Yes, sir, I do.

Q. And, do you understand that you are entitled to be represented by your own attorney?

A. Yes, sir.

Q. An attorney whose loyalty would be owed to you alone without concern or consideration for the other three defendants.

A. Yes, sir.

Q. Do you understand that?

A. Yes, sir.

Q. Now, by being represented by one attorney, necessarily you will be giving up certain rights that you have; do you understand that?

A. Yes, sir, I do.

Q. And, I would not undertake to assess anyone's relative role in this overall charge. But, according to certain papers that have been filed by present counsel, it has been suggested that the role of the four defendants is of a

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differing magnitude; they do differ; that they don't all have the same part in this alleged conspiracy; do you understand that?

A. Yes, sir, I do.

Q. And that necessarily with one attorney and a unified defense, it is all or nothing; everyone either wins or loses; that is the approach that has to be taken?

A. Yes, sir.

Q. Do you understand that in the course of these proceedings one of the defendants might be presented with an offer from the Government of a plea bargain, or immunity, or something, in which a break is offered to one defendant at the expense of the others; in other words, we will offer you a deal if you will testify against your co-defendants.

Do you recognize that as a possibility?

A. Yes, sir, I do.

Q. If such a deal were to be offered to you, is it your belief that you could be advised properly by the present attorney who represents all four defendants as to whether you should accept or reject that offer?

A. Yes, sir.

Q. You think you could be?

A. Yes, sir.

Q. If one or more of the defendants were to accept a deal with the Government and take the stand, or even if

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they don't accept a deal with the Government, if they were

to decide to take the stand and testify in their own defense, do you understand that the joint counsel for the four defendants would not be in a position to cross-examine that defendant?

A. Yes, sir.

Q. Because of the attorney-client relationship that existed.

A. Yes, sir, I understand.

Q. He would not be able to cross-examine that defendant; or if that defendant decided to make a deal with the Government even though the attorney would no longer be representing him, he still couldn't cross-examine him because of the prior attorney-client relationship; do you understand that?

A. Yes, sir, I do.

Q. If one or more of the defendants takes the stand, then the Government is entitled to cross-examine that defendant concerning the activities of all the defendants, not just the one who took the stand, and again, the joint attorney would have his hands somewhat tied in the kinds of questions he could ask to counter the cross-examination of the Government; do you understand that?

A. Yes, sir.

Q. Also, in opening statements and closing statements, individual counsel of course always paint their own client

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as the least culpable, or the most angelic of all of the people involved, and point the finger usually at the others and say, "Well, if there is any proof at all, it is the other fellows, not my client."

Do you realize that joint counsel cannot do that, not if he is going to represent all four; he has to just talk generally about all four and not just say, "Oh, well, Mr. McNamee, at least you ought to be satisfied he had nothing to do with this." Do you realize that?

A. Yes, sir, I do.

Q. So that you would be giving up a very important right, and that this is a possibility in the course of a trial that the evidence might be far greater against the other defendants than against you, and yet counsel would be very restricted in his opportunity to point out the fact that the others were guilty but you were not; do you understand that?

A. Yes, sir, I do.

Q. And also, if the evidence should prove to be much more damaging against one of the defendants than against the others, you understand, of course, that joint counsel then would be concentrating most of his defense efforts on behalf of that one defendant and sometmes it might appear to be at the expense of the defense of the other defendants, do you understand that?

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A. Yes, sir, I do.

Q. Do you also understand that as part of the trial on guilt and innocence defendants are entitled to present as substantive evidence reputation evidence, good character evidence, and that if less than all of the defendants were to present such evidence it would reflect adversely against the one or two defendants, or three defendants that presented no character evidence; do you understand that?

A. Yes, sir, I do.

Q. And that this might cause counsel, joint counsel, to advise not to put on such evidence; do you understand that?

A. Yes, sir.

Q. I assume that in so far as the financial considerations are concerned, your answer is the same as Mr. Flanagan's, Mr. Keweshan's and Mr. Landis: You are expecting the Union to furnish financial support for whatever representation you require, is that correct?

A. That is correct.

Q. Now, in the event that the Union should balk at putting up money for separate attorneys if the Court de-

cides that separate attorneys are in order here, I want you to understand clearly that if you can't afford it or even if you can afford it, if the Court orders that separate counsel be appointed, that it would do so without expense to you;

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do you understand that?

A. Yes, sir.

Q. So, I want that to be part of whatever decision you finally announce.

Now, there has been a decision made, as announced to the Court by Mr. Thall, that the defendants have decided to put on a unified defens you decided to put on the same defense for all defendants.

Do you understand that this same decision could be made even if each defendant was represented by his own separate counsel?

A. Yes, sir.

Q. But that if that decision were made by each defendant represented by separate counsel, we could at least be sure that each decision was independently arrived at with separate advice of counsel; do you understand that?

A. Yes, sir, I do.

Q. Whereas the present decision to put on a unified defense may be suspect because it is one attorney who is advising four defendants as to what they should do; do you understand that?

A. Yes, sir, I do.

Q. Do you understand that if you did have separate counsel and even if separate counsel decided to go along with the unified defense, he might nevertheless in your

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best interest present some separate or alternate kinds of defense that would apply only to you and not to the other defendants; do you understand that?

A. Yes, sir.

Q. And that by being represented by joint counsel you give us that chance to have separate and independent defenses set up for you.

A. Yes, sir.

Q. Now, in light of all of these questions that I have posed to you, is it your desire to waive this very apparent conflict of interest on the part of counsel?

A. Yes, sir, it is.

Q. And that you wish to go to trial being represented by this one attorney, or one law firm.

A. Yes, sir, I do.

The Court: Any other questions?

Mr. Schenck: No.

Mr. Thall: No.

(Witness excused.)

The Court: All right. I would like——

Mr. Thall: Your Honor, if it would be all right with Your Honor, there are about two things that I would like to suggest in response to questions you have asked.

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The Court: I am not quite finished. But, all right, you may make your suggestions, but I am not quite finished.

Mr. Thall: First of all, Your Honor, in connection with your questions you posed respecting pleas, the possibilities of offers by the Government and some deal ranging from immunity to a plea, I think it is important to note that in that instance were there to be a conflict, it would be caused by the Government, not by any acts which may or may not have been committed by the defendant; and that if in fact the mere offer of a plea to one individual were sufficient in and of itself to require the retention of separate counsel, I don't think that that would be proper for the following reasons:——

The Court: Mr. Thall, I really don't care to hear extended argument on that. These are possibilities that all loom on the horizon, and I have to concern myself with whether they are real possibilities.

Mr. Thall: It may then be appropriate, Your Honor, to suggest the Government make a representation respecting its determination whether or not pleas are to be offered——

The Court: No, I would not ask the Government to make any representation at this point.

The question is, what can happen, not what

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will happen or is likely to happen; only, these are considerations that are always present in any criminal case.

Mr. Thall: Understood, Your Honor.

The Court: Now, I would like to offer the opportunity to each of the defendants to make a statement in his own words. But, for this purpose I will clear the courtroom, including Government counsel.

A Newspaper Reporter: Is that the press too, Your Honor?

The Court: Everybody.

(At this time Mr. Weaver, Mr. Schenck, an FBI Agent at counsel table and all spectators in the courtroom withdrew from the courtroom.)

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(The following colloquy took place in the presence of the four defendants, Bruce L. Thall, Esq., Jim Leonard, Esq., two law clerks of Judge Luongo, the court stenographer and the Court itself:)

The Court: All right, Mr. Flanagan, would you come forward again, please?

Would you please tell me in your own words why you want to be represented by one attorney when it is so apparent that there is going to be conflict arising in the course of this trial? Tell me in your own words.

And, I have cleared the courtroom. I don't have the Government attorney here or anyone else. Just tell me in your own words, because I want to understand why you are giving up this very important right.

Mr. Flanagan: Sir, I can only explain it as a layman rather than as an attorney.

The Court: Yes. Just give it to me in your own words.

Mr. Flanagan: All right, sir. I will explain it this way:

Early-on when this situation first developed, and discussing the matter with my colleagues, we determined that we wanted the firm of Sprague & Rubenstone; Mr. Thall and Mr. Leonard are attorneys of the firm.

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We spent quite a bit of time, personal time, attending to the matters relating to this particular situation, discussing particular, specific details regarding the allegations that these attorneys who are present here today are now presently aware of.

I can't speak in behalf of my colleagues, but personally I got—I have developed a large amount of confidence, I fell extremely comfortable with the way the matter has been handled up to the present time.

We have been informed as to every proceeding regarding the matter. And, the issue, as I take it, concerning the allegations, and as I know the cases myself being personally involved in them, I can attest for my behavior and I believe I can also attest for my other brother officers' behavior in these matters.

The Court: Mr. Flanagan—and this is the concern that I want to express—there is no attempt, of course, on anyone's part, to question the ability or integrity of Mr. Sprague, Mr. Thall, and their office. That is not the point at all.

The problem is created because experience has shown in the past that it is almost impossible to avoid conflict of interest where more than one defendant is represented by one attorney.

I have tried to make it abundantly clear

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that it would be at no expense to the defendants to have separate counsel; that there are possibilities, human nature being what it is, that at some point the interests of the defendants may diverge, even though today that appears very unlikely and, it is just incomprehensible to me that nevertheless all four of you wish to proceed with the same attorney. And this is why I wanted you to state in your own terms. And up to now you have simply said it is because you have great confidence in the way Mr. Sprague has advised you and represented you up to this point.

But, you do not seem to have really addressed yourself to what could happen in the future in deciding to forego separate counsel.

Mr. Flanagan: Yes, sir. I appreciate your concern. It seems very apparent that you are trying to advise us as to possibilities that may arise.

I presently—and I am being direct and frank and candid when I say this, at this present point in time I can't comprehend or conceive——

The Court: Of course you can't.

Mr. Flanagan: Well, I am just——

The Court: But, it won't shock you to death if it happens, will it?

Mr. Flanagan: Yes, it would.

The Court: It would?

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Mr. Flanagan: Yes, it would.

The Court: But, you will have been forewarned that those things happen.

Mr. Flanagan: Yes, sir.

The Court: And when it happens, you realize then you are going to have a problem.

Mr. Flanagan: When and if it happens, Your Honor. Yes, sir.

The Court: Yes. And, you are just convinced it isn't going to happen.

Mr. Flanagan: In this particular issue, yes, sir.

The Court: Maybe you need to grow a little older. Thank you.

Mr. Flanagan: Thank you, sir.

The Court: Mr. Keweshan.

Again, I would just like you to tell me in your own words why you want to do it this way with one attorney.

Mr. Keweshan: Well, like Robert Flanagan stated, I have every confidence in Mr. Sprague's firm. I don't think I would feel comfortable with another firm other than Mr. Sprague's, maybe due to the reputation that they have. And, once again, I can't see anybody even being

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approached to make a plea bargain or anything like that, in this trial.

The Court: It could happen.

Mr. Keweshan: I can't say.

The Court: It is also possible that even without plea bargains that the case may be much stronger against one than against another, in which case Mr. Sprague can only argue with one mouth; he can't argue with four mouths for four different people.

Mr. Keweshan: I realize that, sir. But, under the situation of the cases they are addressing, I can't see any evidence that they could prove us wrong on it.

The Court: Suppose they do? That is where the conflicts arise. You see, there is never a problem of a conflict when there is an acquittal. Nobody ever argues about a conflict. It is only when there is a conviction, then defendants say, "Oh, but I was not properly represented." And we have to be concerned about that.

Mr. Keweshan: I understand that, Your Honor.

The Court: Very properly, because we have to make sure you get the best possible defense you can get, and with four attorneys you can still have the benefit of whatever plan and strategy there is. But, you would have the assurance that each one is prepared, each attorney would

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be looking out for his own client and not for four people.

It is always possible, of course, that one of you may be far more deeply involved than the others, which means necessarily that somebody else is far less involved. And, it is possible then that one can get out, or two can get out, but not four. Whereas the way you are going now, one or two of you may be sacrifical lambs because you sink or swim, all four. You either all go in or you all go out.

It is still your decision?

Mr. Keweshan: Yes, sir.

The Court: All right. Thank you.

The Court: Sidney Landis.

Again, I invite you, in your own words.

Mr. Landis: Basically what the other two have said, Your Honor. I am very happy with Mr. Sprague. I think he is the best attorney that I could have.

And, as far as the other men copping a plea, I don't think so. In fact, I know so. I have worked with these men and I know who they are, and what they are, and what they are capable of. And, you know—as well as I know myself.

I know I didn't do it, and they didn't do it either.

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The Court: Well, the point is that the case might not necessarily be the same against all four defendants and, with one attorney, he has no choice. He has to present just one case.

Mr. Landis: Yes, sir. I understand.

The Court: Trying to get all four off. Then, if he does that, one or two innocent people might go down the drain with the others.

Mr. Landis: We are all innocent, Your Honor; all four.

The Court: You are not innocent until the jury says so. You are innocent now; you won't be guilty until the jury says so. But, actually speaking, unless the jury says you are innocent, you won't be innocent after the trial. You are innocent now. You have the presumption of innocence, all four of you.

Mr. Landis: Yes, sir, I understand.

The Court: But, after the trial, it is only if the jury says so that you will be innocent.

And, what I am saying is, that if a unified defense is presented, it is either all four in or all four out.

Mr. Landis: Yes, sir.

The Court: It won't be half way, or it may not be. There will be serious questions if the attorney is able to get one or two out and not all four, if it is

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one attorney.

You have the benefit of the one attorney—I am not sure you would at that point—but still have the benefit of separate counsel if all four of you had separate attorneys.

But, it is—in your own words, you want to do this because you are very satisfied with Sprague and his office.

Mr. Landis: Yes, sir, I am.

The Court: Thank you very much.

Mr. Landis: You are welcome.

The Court: Thomas McNamee.

I invite you to make the same statement, Mr. McNamee.

Mr. McNamee: Thank you, Your Honor.

Your Honor, rather than rehash everything the other members of the team have said, I would just like to let it be known that we were in fact a team: Four different individuals, four different personalities, but a team. What we did on the street we did as a team. We are coming to court as a team. That is all I want to say.

The Court: And, what you are saying in effect is, that even if your role was much less culpable than the role of other members of the team, you are willing

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to share team guilt.

Mr. McNamee: Sir, we work as a team on the street, we worked as four individuals as one body. That's——

The Court: Well, still, it is possible for parts of a team to be operating, each doing his own individual job, and it is possible for one to have been doing it in a fashion that wouldn't violate anybody's rights, and for somebody else to be doing something that did.

Mr. McNamee: No, sir. It is my belief that everyone on the team performed in a manner they were supposed to perform.

The Court: All right. Thank you.

(At this time the courtroom was opened to all parties. Mr. Weaver, Mr. Schenck, and spectators returned to the courtroom.)

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(The following colloquy took place in open court:)

The Court: All right. I will make my statements.

It appears to me quite apparent that a conflict of interest is likely to arise in the course of these proceedings.

It is equally apparent that each of these defendants is fully and completely aware of the potential for conflict of interest, and that each, without financial pressure, has made the decision to waive any claim of conflict of interest, and is doing so intelligently and voluntarily, and to be represented by one counsel.

This does not end the inquiry. I am not satisfied at this moment that in light of my perception that the conflict of interest is very likely to arise in this case, that I can nevertheless accept the waiver of these defendants.

I will ask both counsel to brief that point a bit more thoroughly before I make the decision.

If I decide that notwithstanding the waiver of these defendants that I cannot accept it in light of the likelihood of conflict, it is my intention to appoint separate counsel, and my suggestion that an immediate appeal be taken,

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because the trial should not proceed if the defendants are proceeding in a fashion contrary to their desires. So, will you address yourselves as quickly as you can to that one issue.

It is regrettable that this situation has arisen, because I have a stack of motions on my desk that I am prepared to deal with. But, I cannot until the role of counsel has been clarified.

I will ask that counsel submit these memoranda within one week, and I will try to deal with it promptly thereafter.

I have made my findings concerning the conflict very likely to arise and the waiver. So, you start with those as my findings, and then you will make your argument from there in your briefs, and you will present your briefs simultaneously. I don't think it is necessary to respond to each other's briefs. You just give me all the law you can come up with as to whether I nevertheless am obligated under the circumstances in view of my perception that the conflict is a very likely one, whether I should accept the waiver or nevertheless proceed to appoint separate counsel.

Mr. Thall: Of course, Your Honor.

Mr. Weaver: Yes.

The Court: There is one further thought

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that should be explored.

If I do decide that separate counsel are required, does this require that present counsel be eliminated from the case altogether? I think that was the situation in Dolan, if I am not mistaken. But, I leave it open. I want counsel to brief all of those points, because I want to understand the full implications of whatever decision I make and then we will proceed from there.

This hearing is adjourned.

A word of explanation to the press. I will simply point out that under the Rule an opportunity is to be given to defendants to make a statement in their own words that might otherwise appear prejudicial. And that is why we cannot have the Government here, and if I can't have the Government here I certainly don't want to have the press passing on to the Government what was said by the defendants.

Mr. Thall: Thank you, Your Honor.

(Court adjourned at 12:15 p.m.)

Reported by:
David S. Ehrlich, CSR

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